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United States
Court of Appeals
for the Ninth Circuit

PUGET SOUND PULP AND TIMBER CO., a
corporation, and LAWSON TURCOTTE,
Appellants,

vs.

JOE A. O'REILLY, Appellee.

JOE A. O'REILLY, Appellant,

vs.

PUGET SOUND PULP AND TIMBER CO., a
corporation, and LAWSON TURCOTTE,
Appellees.

Transcript of Record

Appeal from the United States District Court for the Western
District of Washington, Northern Division

FILED

JAN 25 1956

PAUL R. GARDEN, CLERK

No. 14906

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Court of Appeals
for the Ninth Circuit

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | PAGE |
|--|--------|
| Answer, Affirmative Defenses and Counterclaim | 19 |
| Appeal: | |
| Bond for Costs on | 53 |
| Bond for Costs on Cross..... | 49 |
| Certificates of Clerk to Transcript of Record on | 59, 64 |
| Designation of Record and Statement of Points on (Appellants'-DC) | 54 |
| Designation of Record and Statement of Points on (Appellee's-DC) | 56 |
| Notice of | 47 |
| Notice of Cross | 48 |
| Statement of Points on (Appellants'-USCA) | 294 |
| Statement of Points on (Appellee's-USCA). | 296 |
| Stipulated Facts in Narrative Form for Con- sideration on | 57 |
| Stipulation and Order re Withdrawal and Substitution of Supersedeas Bond on.... | 50-52 |
| Stipulation re Use of Original Exhibits on (USCA) | 295 |
| Bond for Costs on Appeal | 53 |
| Bond for Costs on Cross-Appeal..... | 49 |

| | |
|--|--------|
| Certificates of Clerk to Transcript of Record. | 59, 64 |
| Complaint | 3 |
| Exhibit A—Agreement dated May 22, 1946, between Puget Sound Pulp and Timber Co. and Joe A. O'Reilly | 8 |
| Exhibit B—Agency Agreement dated June, 1946, between Bellingham Paper Products Co. and Joe A. O'Reilly..... | 15 |
| Decision, Oral | 288 |
| Designation of Record and Statement of Points (DC): | |
| Appellants Puget Sound Pulp & Timber Co. | 54 |
| Appellee Joe A. O'Reilly | 56 |
| Findings of Fact and Conclusions of Law..... | 34 |
| Exhibit A—Agreement dated May 22, 1946, between Puget Sound Pulp and Timber Co. and Joe A. O'Reilly, set out at page..... | 8 |
| Exhibit B—Agency Agreement dated June, 1946, between Bellingham Paper Products Co. and Joe A. O'Reilly, set out at page... | 15 |
| Exhibit C—Schedule of Payments Received by Plaintiff from Puget Sound Pulp & Timber Co. covering Jan., 1949, to Feb. 29, 1952 | 43 |
| Judgment | 45 |
| Names and Addresses of Attorneys..... | 1 |
| Notice of Appeal | 47 |
| Notice of Cross-Appeal | 48 |
| Pre-Trial Stipulation | 30 |

| | |
|--|----------|
| Reply | 29 |
| Statement of Points on Appeal: | |
| Appellants Puget Sound Pulp and Timber Co. (DC) | 54 |
| Appellants Puget Sound Pulp and Timber Co. (USCA) | 294 |
| Appellee Joe A. O'Reilly (DC)..... | 56 |
| Appellee Joe A. O'Reilly (USCA)..... | 296 |
| Stipulated Facts in Narrative Form for Con- sideration on Appeal | 57 |
| Stipulation re Use of Original Exhibits on Ap- peal (USCA) | 295 |
| Stipulation Regarding Withdrawal and Substi- tution of Supersedeas Bond and Order.... | 50-52 |
| Transcript of Proceedings and Testimony (Portions) | 65 |
| Oral Decision | 288 |
| Witnesses: | |
| deLopez, Russell | |
| —direct | 265 |
| —cross | 268 |
| —redirect | 272, 274 |
| —recross | 272, 275 |
| Emmons, Thomas Guy (Deposition) | |
| —direct | 170 |
| —cross | 178 |
| —redirect | 182 |
| —recross | 183 |

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Frankl, John H. (Deposition)

| | |
|-----------------|---------------|
| —direct | 185 |
| —cross | 196 |
| —redirect | 203, 207, 208 |
| —recross | 203, 208 |

O'Reilly, Joe A.

| | |
|-------------------------|-----|
| —direct | 65 |
| —cross | 106 |
| —redirect | 147 |
| —recross | 161 |
| —rebuttal, direct | 279 |
| —cross | 283 |

Roberg, Ralph M.

| | |
|---------------|-----|
| —direct | 211 |
| —cross | 221 |

Rogers, Clayton E.

| | |
|---------------|-----|
| —direct | 275 |
|---------------|-----|

Turcotte, Lawson P.

| | |
|---------------|----------|
| —direct | 226, 264 |
| —cross | 249 |

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Seattle 4, Washington.

District of Washington, Northern Division

No. 125

JOE A. O'REILLY, Plaintiff,

VS.

PUGET SOUND PULP & TIMBER CO., a corporation; and LAWSON TURCOTTE,
Defendants.

COMPLAINT

Comes now plaintiff and for cause of action against the defendants alleges:

I.

That plaintiff is a citizen and resident of the State of California.

II.

That defendant, Puget Sound Pulp & Timber Co., is a private corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal office and place of business in Bellingham, Washington, within the jurisdiction of this court; that the defendant, Lawson Turcotte is a citizen and resident of the State of Washington residing in Bellingham, Washington within the jurisdiction of this court.

III.

That the matter in controversy herein exceeds, exclusive of interest and costs, the sum of three thousand dollars.

IV.

That on or about the 22nd day of May, 1946, plaintiff and defendant, Puget Sound Pulp & Timber Co. entered into a contract in writing, a true copy of which is attached hereto as Exhibit "A", and, by this reference, made a part hereof as though the same were fully set forth herein.

V.

That on or about the 25th day of May, 1946, the corporation to be organized, pursuant said contract, to-wit: Bellingham Paper Products Company, was in fact organized as a Washington corporation immediately upon the execution of said Exhibit "A" and its stock issued as contemplated by said agreement.

VI.

That also pursuant to said Exhibit "A" Bellingham Paper Products Company, a corporation, and plaintiff entered into a contract in writing in June, 1946, a true copy of which is attached hereto as Exhibit "B", and, by this reference, made a part hereof as though the same were fully set forth herein.

VII.

That in the latter part of 1947, the defendant Puget Sound Pulp & Timber Co. purchased all of the assets, liabilities and capital stock of the Bellingham Paper Products Company and thereafter, in December, 1947, commenced to dissolve said corporation, completing the dissolution thereof on March 13, 1948; that Puget Sound Pulp & Timber

Co. succeeded to all of the rights, duties and obligations of the said Bellingham Paper Products Co.; that the operations of said Bellingham Paper Products Company were integrated into the operation of Puget Sound Pulp & Timber Co. and became thereafter known as the "Paperboard Division" of the said Puget Sound Pulp & Timber Co.

VIII.

That plaintiff fully performed all of the conditions and obligations of said contracts, Exhibits "A" and "B", from the inception of said contracts down to and including the 28th day of February, 1952, upon which date said contracts were mutually terminated by the parties thereto; that defendant, Puget Sound Pulp & Timber Co., and its predecessor, Bellingham Paper Products Company, fully performed said agreements from their inception down to and including the 31st day of December, 1948, paying plaintiff 3% of net sales of said Paperboard Division during said period in accordance with the terms of said contracts; that from and including the 1st day of January, 1949, down to and including the 28th day of February, 1952, defendant, Puget Sound Pulp & Timber Co. paid unto plaintiff the gross sum (before income tax withholding, old age benefit and other deductions) of \$59,572.04, which sum represents 11½% of net sales of said Paperboard Division during said period; that pursuant to said contracts, defendant, Puget Sound Pulp & Timber Co. became indebted to plaintiff during said period in the total sum of \$119,144.08,

said sum being 3% of net sales of said Paperboard Division during said period.

That by reason of the foregoing defendant, Puget Sound Pulp & Timber Co. is indebted to plaintiff in the sum of \$59,572.04, together with interest thereon at the legal rate from and after the respective dates upon which each of said monthly payments became due.

For a second cause of action, plaintiff alleges:

I.

Plaintiff re-alleges paragraphs I through VIII of his first cause of action.

II.

That at all times herein mentioned, the State of Washington had enacted and there was in full force and effect laws of 1941, Chapter 72, Section 1 (RCW 49.52.050) and laws of 1939, Chapter 195, Section III (RCW 49.52.070) making it unlawful for any employer or for any officer, vice-principal or agent of such employer to willfully and with intent to deprive any employee of any part of his wages to pay such employee a lower wage than the wage such employer is obligated to pay such employee by contract, and providing for exemplary damages for twice the amount of the wages so withheld and for reasonable attorney's fees and costs in the event of a violation of said act.

III.

That at all times herein mentioned, the defendant, Lawson Turcotte, was an officer, vice-principal and

agent of the defendant, Puget Sound Pulp & Timber Co., plaintiff's employer as aforesaid; that said Lawson Turcotte and the defendant, Puget Sound Pulp & Timber Co. and each of them willfully and with intent to deprive plaintiff of a part of his wages as aforesaid, paid plaintiff gross wages of \$59,572.04, for the period January 1, 1949 to February 28, 1952, both dates inclusive, when the gross wages due plaintiff for said period, pursuant to his contract with said employer, was the sum of \$119,-144.09, all in violation of the statutes in such cases made and provided.

IV.

That a reasonable attorney's fee herein is the sum of \$30,000.00.

For a third but alternative cause of action, plaintiff alleges:

I.

Plaintiff realleges Paragraphs I through VIII of his first cause of action and Paragraphs I through IV of his second cause of action.

II.

That between the inclusive dates January 1, 1949 and February 28th, 1952, defendant Puget Sound Pulp & Timber Co. and Lawson Turcotte became indebted to plaintiff in the sum of \$208,716.12, exclusive of interest, for money had and received by said defendants for the use and benefit of and for the account of plaintiff; that no part of said sum has been paid although demanded.

Wherefore, plaintiff prays that he have judgment,

1. Against the defendant Puget Sound Pulp & Timber Co., on his first cause of action in the sum of \$59,572.104, together with interest thereon from and after the respective dates when each of said payments became due at 6% per annum, and

2. Against the defendants, Puget Sound Pulp & Timber Co. and Lawson Turcotte, and each of them, on his second cause of action in the sum of \$119,-144.08, together with interest thereon at the legal rate as aforesaid and a reasonable attorney's fee in the sum of \$30,000.00, and,

3. Against the defendants Puget Sound Pulp & Timber Co. and Lawson Turcotte and each of them, on his third cause of action in the sum of \$208,-716.12, together with interest as aforesaid, in the alternative, however, and in the event plaintiff's prayer for relief on his first or second cause of action or either of them, is denied, and

4. For his costs and disbursements taxable herein and for such other and further relief as the premises warrant.

/s/ KENNETH J. SHORT
RUMMENS, GRIFFIN, SHORT &
CRESSMAN and MAX BERNBAUM
Attorneys for Plaintiff

EXHIBIT "A"

Agreement

It is agreed between the Puget Sound Pulp and Timber Co., a Delaware corporation, as first party, and Joe A. O'Reilly, whose business address is 2611

Pacific Avenue, Tacoma, Washington, as second party, as follows:

(1) A corporation named Bellingham Paper Products Company, with its principal place of business in Bellingham, Washington, shall be organized under the laws of the State of Washington, for the purpose of engaging in manufacturing business, said corporation to have an authorized capital of \$200,000.00, represented by 2,000 shares of non par common stock; said corporation to be governed by a board of five directors. The incorporators of the new corporation shall be Lawson Turcotte, Joe A. O'Reilly and Robert H. Evans.

(2) The stock of said corporation shall be subscribed for and issued as follows: 75% to first party and 25% to second party. It shall be issued for the consideration specified in this agreement.

(3) In addition to its capital, it is contemplated the corporation shall immediately borrow a sum approximating \$200,000.00 for which the capital stock of the corporation shall be pledged if necessary as security by the stockholders, the note or agreement securing said loan to be guaranteed by first party. It is contemplated that this loan shall be a five-year loan, the company to be privileged by the terms thereof to repay the same at an earlier date, and that the loan agreement securing the same will obligate the company to devote all of its net earnings, during the time the loan is outstanding, towards its repayment with interest.

(4) First party will pay its subscription in cash; second party by the furnishing of various paper-

making machinery owned by him known as the Elkhart Machine now located at Watertown, New York, and in Tacoma, Washington, the same having been inspected by an agent of first party and found satisfactory for the purposes for which the parties intend to use the same. It is agreed the machinery has a value of \$48,000.00 and second party will be credited with said amount, the machinery mentioned to be transferred to the Bellingham Paper Products Company by a good and sufficient bill of sale, free of taxes and other items or claims. Delivery of the machinery "as is" shall be made at Watertown and Tacoma upon the signing of this agreement. The balance of capital to be contributed by second party, namely, \$2,000.00 shall be in cash.

(5) First party owns a suitable site in Bellingham, Washington, for the erection of a paper board mill, and agrees to lease the northerly half of Block 189 of New Whatcom Tidelands in said City for use as such site, the lease to run for a term of thirty-five (35) years from date with an annual rental that will yield first party 5% of the actual allocated cost of said site plus 5% of the actual allocated cost of filling the same, which first party hereby undertakes to do as soon as this work can be accomplished.

(6) The site described in paragraph (5) hereof shall be improved as quickly as possible by the erection of a suitable building or buildings for the housing of the machinery and equipment to be obtained from second party, and such other and further machinery and equipment as the company may cause

to be acquired and placed therein. All such machinery shall be overhauled and placed in first-class working condition.

(7) The lease shall contain an option which will vest in the Bellingham Paper Products Company a right to buy the site at any time at a figure which will represent the investment of first party therein, and in addition, a right to renew the lease for a term of twenty-five (25) years after the expiration of the first term of said lease.

(8) Bellingham Paper Products Company, when organized, shall enter into a five-year agency agreement with second party (the agency to run from the beginning of manufacture in said mill) for the sale by second party of the manufactured products of said corporation, the corporation to pay second party 3% of the net sales price f.o.b. the mill at Bellingham on all sales made by the company, and such items of expense as shall be approved by the Board of Directors of the corporation. The sales policy of the company and each contract for sale of the products thereof shall be subject to the approval of the Board of Directors of the company or such designated officer or committee thereof as may be specified by the Board, and second party as sales agent shall have no authority to make binding sales unless the same are approved as herein provided.

Should second party become incapacitated by sickness, injury or other casualty, rendering it impracticable for him to carry on and perform the functions of selling the products of the company, the contract shall vest in the Board of Directors of

the company the power to cancel the same or to suspend it during any such period. Should second party breach the contract of sales in any manner, or should his work in conducting the sales for the company prove inefficient and unsatisfactory to the Board of Directors, the contract shall provide that at any time after two (2) years from the date the mill commences production the Board of Directors may terminate the agreement by paying second party all commissions then due and payable to him and by tendering him in exchange for a transfer of any stock then owned by him the amount invested by him therein at the rate of \$100.00 per share, plus any amount earned by the stock then owned by him not theretofore paid to him in the form of dividends, it being the intention that if any amount has been paid out of net earnings on account of the indebtedness of the corporation or otherwise, that such sum so earned on his stock at the time of cancellation shall be paid to him; provided, it shall be optional with second party whether or not he accepts said tender and transfers his said stock, or whether he will retain the ownership of his stock in the company, provided further, his refusal of such tender shall not affect the cancellation of the sales agency contract, and that nothing herein contained shall be construed as authorizing the second party to voluntarily terminate the agency agreement and claim the benefits of this paragraph. In addition to the commission provided for hereinabove, the new corporation, the Bellingham Paper Products Company, shall pay second party \$100.00

per week to cover one half of the time of second party during the time the board mill is under construction. This payment per week shall terminate when production is started in said plant.

(9) First party agrees to enter into a contract with the Bellingham Paper Products Company to furnish the plant of said corporation steam, water and electricity at the cost to first party, such cost to include amortization of any new construction called for by the contract with said Bellingham Paper Products Company; also to enter into a contract with the Bellingham Paper Products Company to furnish slush pulp at the average monthly net price f.o.b. mill Bellingham, Washington, for finished pulp (all sales considered) less the cost of drying, baling, handling, and commissions of the sale of finished pulp, but plus the cost of metering, pumping and handling the slush pulp. Prices shall be adjusted monthly, based on the current month.

(10) First party and second party, as prospective stockholders in said Bellingham Paper Products Company, agree that they will, upon the organization of said corporation, enter into an agreement effective for ten (10) years after the organization of said corporation, binding each of said parties not to sell their stock nor any shares thereof without first offering it for sale to the opposite party for a period of thirty (30) days at the best price obtainable or offered for said stock. The restriction upon the sale of said stock shall constitute a covenant running with the title to such stock and to the transfer thereof, and no transfer of any shares of

said stock made in violation of said agreement shall be entered of record on the stock ledger of said corporation. A suitable legend indicating the substance of this agreement shall be stamped on each certificate of said stock before same is issued to the parties.

(11) It is agreed that when the corporation, Bellingham Paper Products Company, shall have been organized in accordance with the terms hereof, and the lease described in paragraphs (5), (6) and (7), and the agreements provided for in paragraphs (8), (9) and (10) hereof, have been executed and delivered, that this agreement has been fully performed by the parties as to said paragraphs and shall only remain in effect thereafter as a statement of the intentions of the parties as to the securing of said loan and the erection of said board mill as outlined herein.

In witness whereof the parties hereto have caused this agreement to be executed in triplicate this 22nd day of May, 1946.

Puget Sound Pulp and Timber Co.

/s/ By L. Turcotte,
Executive Vice President

Attest:

/s/ Harry A. Binzer, Secretary
First Party

/s/ Joe A. O'Reilly,
Second Party

State of Washington,
County of Whatcom—ss.

On this 22nd day of May, 1946, before me personally appeared L. Turcotte and Harry A. Binzer, to me known to be the Executive Vice President and Secretary respectively of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed thereto is the corporation seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

/s/ J. C. McGregor

Notary Public in and for the State of Washington,
residing at Bellingham.

EXHIBIT "B"

Agency Agreement

It is agreed between the Bellingham Paper Products Company, a corporation, first party (hereinafter called the "Company"), and Joe A. O'Reilly (business address: 2611 Pacific Avenue, Tacoma, Washington, hereinafter called second party, as follows:

(1) The Company hereby agrees with second party to employ second party as its agent, said agency to commence with the beginning of the man-

ufacture of materials in the paper board mill to be erected by the Company on property leased from Puget Sound Pulp and Timber Co. in Bellingham, Washington, for the exclusive sale by second party of the manufactured products of the Company, the Company to pay second party a commission of three per cent (3%) of the net sales price f.o.b., said mill of the Company at Bellingham, on all sales made by the Company, and also to reimburse second party for such items of expense as shall be incurred by him, the same to be first duly approved by the Board of Directors of the Company. The sales policy of the Company and each contract of sale of its products shall be subject to the approval of the Board of Directors of the Company, or such designated officer or committee of the Board as may be specified by the Board, and second party as sales agent shall have no authority to make binding sales unless the same are approved as hereinabove provided.

(2) Should second party at any time during the life of this contract become incapacitated by sickness, injury or other casualty, rendering it impracticable for him to carry on and perform the functions of selling the products of the Company, the Board of Directors of the Company shall have power to cancel this contract or to suspend it during any such period. Should second party breach this contract in any manner, or should his work in conducting the sales for the company prove inefficient and unsatisfactory to the Board of Directors of the Company, the Board shall at any time after

two (2) years from the date the mill of the Company commences production have authority to terminate the agreement by paying second party all commissions then due and payable to him and by tendering him in exchange for a transfer of any stock then owned by him in the Company, to the Company or its nominee, the amount invested by him therein at the rate of One Hundred Dollars (\$100) per share, plus any amount earned by the stock then owned by second party not theretofore paid second party in the form of dividends, it being the intention of this agreement that if any amount has been paid out of net earnings of the Company on account of its indebtedness or otherwise, that such sum so earned on second party's stock at the time of the cancellation of this agreement shall be paid to him; provided, it shall be optional with second party whether or not he accepts said tender and transfers his stock or whether he will retain the ownership of his said stock in the Company; provided further, that the refusal of second party of such tender shall not affect the cancellation of this contract, and nothing herein contained shall be construed as authorizing second party to voluntarily terminate this contract and claim the benefits of this paragraph.

Nothing above set forth in this paragraph shall be construed as a limitation upon or as affecting the right of either the Company or second party to terminate and end this contract for willful or intentional breach thereof by the opposite party.

In addition to the commissions provided for in

this agreement, The Company shall pay second party One Hundred Dollars (\$100) per week to cover one half of the time of second party during the time the paper board mill is under construction. This payment per week shall terminate when production is started in said plant.

(3) All sales made by second party shall be in the name of the Company, and all goods or products sold shall be shipped directly by the Company to the purchaser. All moneys becoming due the Company for sales shall be collected exclusively by the Treasurer or other designated officer of the Company, and nothing herein contained shall be construed as authorizing second party to undertake to, or to collect on such sales.

(4) Second party agrees to devote such time and effort to the making of said sales as shall be necessary to accomplish the same, and second party agrees to use due diligence and exercise the best of faith in carrying out and performing this contract. Second party further agrees that while this contract is in force and effect, he will not undertake or promote the sale or sales of like, similar, or competing commodities on behalf of any other company or person. Except those products which are manufactured and sold by him in his plants in Tacoma, Wash. operated under the trade name of the Standard Carton Co.

(5) It is further agreed that this contract embodies all the terms and conditions of the agency agreement created hereby and that there are no oral or other understandings not set forth herein.

In witness whereof, the parties hereto have executed this agreement this.....day of June, 1946.

Bellingham Paper Products Company
By....., President

Attest:....., Secretary

.....,
(Joe A. O'Reilly)

[Endorsed]: Filed Sept. 18, 1953.

[Title of District Court and Cause.]

ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIM

Come now the defendants, Puget Sound Pulp and Timber Co., a corporation, and Lawson Turcotte, and answering the first cause of action of the complaint of the plaintiff, admit, deny and allege as follows:

I.

Defendants admit paragraphs I to V, inclusive.

II.

Answering paragraph VI, defendants admit that Exhibit B therein referred to sets for the terms of the contract entered into between Bellingham Paper Products Company and plaintiff, but deny that the said contract was ever signed by said parties and, therefore, deny that said contract was in writing.

III.

Answering paragraph VII, defendants admit the same, except defendants deny that the dissolution of Bellingham Paper Products Company was completed on March 13, 1948, and allege that the same was completed in December, 1947, and further deny that in the dissolution of Bellingham Paper Products Company the defendant, Puget Sound Pulp and Timber Co., succeeded to or assumed any duties and obligations of said Bellingham Paper Products Company except its current operating expenses and current debts. Defendants deny that the defendant, Puget Sound Pulp and Timber Co., assumed any duties and obligations due or alleged to be due to plaintiff.

IV.

Answering paragraph VIII, defendants deny that the plaintiff fully performed all of the conditions and obligations of the contracts referred to in plaintiff's complaint as Exhibits A and B from their inception down to and including the 29th day of February, 1952. Defendants admit that said written contract, Exhibit A, and oral contract, Exhibit B, therein referred to, were fully performed from their inception down to and including the 31st day of December, 1948; deny that said contracts as later modified, as hereinafter set forth, were not fully performed by the defendant, Puget Sound Pulp and Timber Co., down to and including February 29, 1952, and allege that all moneys due to plaintiff under said contracts, as modified, were paid for the period commencing January 1, 1949, down to

and through the month of February, 1952. Defendants deny that either of the defendants is indebted to plaintiff in the sum of \$59,572.04, or in any sum whatsoever.

V.

Answering paragraph I of plaintiff's second cause of action, defendants admit, deny and allege the same allegations and parts thereof as above admitted, denied and alleged as to plaintiff's first cause of action.

VI.

Answering paragraph II of plaintiff's second cause of action, defendants admit there was in full force and effect the statute of the State of Washington therein referred to, but deny each and every other allegation therein contained.

VII.

Answering paragraph III of plaintiff's second cause of action, defendants admit that the defendant, Lawson Turcotte, was president and one of the directors of the defendant, Puget Sound Pulp and Timber Co., but deny each and every other allegation therein contained and specifically deny that either of the defendants is indebted to plaintiff in the sum of \$119,144.09, or in any sum whatsoever.

VIII.

Answering paragraph I of plaintiff's third but alternative cause of action, defendants admit, deny and allege the same allegations and parts thereof as above admitted, denied and alleged as to plaintiff's first cause of action.

IX.

Answering paragraph II of plaintiff's third but alternative cause of action, defendants deny each and every part thereof and specifically deny that either of the defendants is indebted to plaintiff in the sum of \$208,716.12, or in any sum whatsoever.

Further Answering Plaintiff's Complaint and as a First Affirmative Defense, defendants allege:

X.

That the defendants have no records or recollections indicating that Exhibit B to plaintiff's complaint was ever executed and therefore allege that the same was an oral contract. That during the month of January, 1949, the plaintiff and the defendant, Puget Sound Pulp and Timber Co., entered into an oral agreement amending said oral contract attached to plaintiff's complaint as Exhibit B, which amendment provided that commencing with the month of January, 1949, plaintiff's commission on the net sales of the Paper Board Division of the defendant, Puget Sound Pulp and Timber Co., would be 11½% of the net sales instead of 3% of the net sales, and further provided that the expenses to be allowed and paid to the plaintiff would be increased.

XI.

That at all times commencing with the month of January, 1949, down to and through the month of February, 1952, the defendant, Puget Sound Pulp and Timber Co., paid plaintiff all commissions due

him in accordance with said agreements at the rate of $11\frac{1}{2}\%$ of the net sales.

Further Answering Plaintiff's Complaint and as a Second Affirmative Defense, defendants allege:

XII.

Defendants re-allege each and every allegation hereinabove set forth in defendants' first affirmative defense.

XIII.

That on January 1, 1949, and continuing until February 29, 1952, the defendant, Puget Sound Pulp and Timber Co., regularly and at monthly intervals, paid plaintiff by check all commissions due him on net sales of the Paper Board Division of the defendant, Puget Sound Pulp and Timber Co., at the rate of $11\frac{1}{2}\%$ of the net sales in accordance with said oral agreements hereinabove referred to and furnished with said checks an accounting of all net sales and the rate at which plaintiff's commissions were determined, which checks and accountings were accepted and received by plaintiff without any protest or exception, and that plaintiff is now barred and estopped from asserting that he is entitled to more than $11\frac{1}{2}\%$ of the net sales for said period.

Further Answering Plaintiff's Complaint and as a Third Affirmative Defense, defendants allege:

XIV.

Defendants re-allege each and every allegation

hereinabove set forth in defendants' first affirmative defense.

XV.

That said written and oral contracts referred to in plaintiff's complaint as Exhibits A and B, respectively, provide in part that should plaintiff breach the contract in any manner or should his work in conducting sales of the Bellingham Paper Products Company or the Paper Board Division of the defendant company prove inefficient and unsatisfactory, at any time after two years from the date the paper board mill commenced production, the services of plaintiff could be terminated by paying to plaintiff all commissions then due and payable to him and by tendering him, in exchange for the transfer of any stock of Bellingham Paper Products Company then owned by him, the amount invested by him therein at the rate of \$100.00 per share plus any amount earned by the stock then owned by him not theretofore paid to him in the form of dividends. That the defendant, Puget Sound Pulp and Paper Co., in November, 1947, purchased all stock owned by plaintiff in said Bellingham Paper Products Company at the rate of \$270.00 per share, which was in excess of the amount provided for in said contract. That the paper board mill in question commenced production in May, 1947.

XVI.

That the services of plaintiff in conducting the sales contemplated by the contracts above referred to were inefficient and unsatisfactory and that by

reason thereof his services were terminated by the defendant, Puget Sound Pulp and Timber Co., as of September 1, 1951, although he was paid a commission on all net sales up to and through the month of February, 1952. That the moneys paid to plaintiff by the defendant, Puget Sound Pulp and Timber Co., covering said period from January 1, 1949, through the month of August, 1951, while plaintiff was manager of the Paper Board Division of the defendant, Puget Sound Pulp and Timber Co., and covering the time from September 1, 1951, through the month of February, 1952, when plaintiff performed no services whatsoever for said defendant, Puget Sound Pulp and Timber Co., were tendered to plaintiff as payment in full of all moneys due him and were accepted by plaintiff as such, and constitute an accord and satisfaction.

Further Answering Plaintiff's Complaint and by Way of a Fourth Affirmative Defense, defendants allege:

XVII.

Defendants re-allege each and every allegation hereinabove set forth in defendants' first affirmative defense.

XVIII.

That said contracts provide in part that plaintiff exercise the best of faith in carrying out and performing said contracts, and that while said contracts were in force and effect the plaintiff would not undertake or promote the sale or sales of like,

similar or competing commodities or products of other companies except those products which were manufactured and sold by him in his plant in Tacoma, Washington, operating under the trade name of "Standard Carton Company." That plaintiff breached said contracts in that he did undertake to promote the sale or sales of like, similar or competing commodities or products of companies other than said Standard Carton Company during the year 1951, and that by reason thereof his services were terminated on August 31, 1951, by the defendant, Puget Sound Pulp and Timber Co., in the manner provided in said contracts.

Further Answering Plaintiff's Complaint and by Way of a Fifth Affirmative Defense, defendants allege:

XIX.

Defendants re-allege each and every allegation hereinabove set forth in defendants' first affirmative defense.

XX.

That on or about August 31, 1951, for a valuable consideration passing from the defendants to the plaintiff, the plaintiff and the defendants at said time agreed that the contracts then existing between the parties, including those set forth in plaintiff's complaint, and each of them, as amended, should be terminated and ended on said date and each party released from any further liability and responsibility thereunder. That thereafter the defendant Puget Sound Pulp and Timber Co. paid

the consideration agreed upon and thereupon said mutual release became effective and binding upon the plaintiff and the defendants.

Further Answering Plaintiff's Complaint and by Way of a Sixth Affirmative Defense, defendants allege:

XXI.

Defendants re-allege each and every allegation hereinabove set forth in defendants' first affirmative defense.

XXII.

That said contract of May 22, 1946, was fully carried out by the defendant, Puget Sound Pulp and Timber Co., and that any action thereon is barred by the statute of limitations.

Further Answering Plaintiff's Complaint and by Way of a Seventh Affirmative Defense, defendants allege:

XXIII.

Defendants re-allege each and every allegation hereinabove set forth in defendants' first affirmative defense.

XXIV.

That said oral contract referred to in plaintiff's complaint as Exhibit B and the oral agreement which was entered into by and between plaintiff and defendant, Puget Sound Pulp and Timber Co., in January, 1949, modifying the same, were fully carried out and performed by the defendant, Puget Sound Pulp and Timber Co., and that any action thereon is barred by the statute of limitations.

Counterclaim

Further answering said complaint and as a counterclaim thereto, in accordance with Rule 13 of Title 28 of U.S.C.A., the defendants allege:

XXV.

That certain items of expense which the plaintiff requested the defendant, Puget Sound Pulp and Timber Co. to pay and which were paid by said defendant to or on behalf of the plaintiff for the period from January 1, 1949, until plaintiff's services were terminated, were for plaintiff's personal expenses and were in no way connected with the business of the defendant Puget Sound Pulp and Timber Co. The defendant Puget Sound Pulp and Timber Co. demands an accounting of the plaintiff's expenses incurred for said defendant for said period and is entitled to recover from the plaintiff a judgment for those items of expense improperly charged by the plaintiff to the defendant Puget Sound Pulp and Timber Co. and paid by said defendant to the plaintiff.

Wherefore, having fully answered plaintiff's complaint defendants pray that plaintiff's complaint be dismissed and that they each recover a judgment against plaintiff herein for their costs and statutory attorneys' fees.

Defendant Puget Sound Pulp and Timber Co. further prays that plaintiff be required to account for his expenses charged to and paid by the defend-

ant Puget Sound Pulp and Timber Co. for the period from January 1, 1949, until plaintiff's services were terminated and that said defendant Puget Sound Pulp and Timber Co. recover a judgment against the plaintiff for those items of expense improperly charged to and paid by said Puget Sound Pulp and Timber Co. to said plaintiff.

/s/ EVANS, McLAREN, LANE,
POWELL & BEEKS,

/s/ ROBERT H. EVANS,

/s/ W. BYRON LANE,

/s/ VAUGHN E. EVANS,

/s/ J. ALLAN EVANS,

Attorneys for Defendants

Acknowledgment of Service attached.

[Endorsed]: Filed December 18, 1953.

[Title of District Court and Cause.]

REPLY

Comes Now the plaintiff and in reply to defendants' affirmative defenses and counterclaim alleges as follows:

Plaintiff denies each and every allegation contained in defendants' affirmative defenses, and each of them, and in defendants' counterclaim.

Wherefore, having fully replied, plaintiff prays that defendants take nothing by their Answer and

Counterclaim and that plaintiff have judgment as prayed for in his complaint.

RUMMENS, GRIFFIN, SHORT &
CRESSMAN and MAX
BERNBAUM,

TRACY E. GRIFFIN,
KENNETH P. SHORT,
PAUL R. CRESSMAN,
MAX BERNBAUM,

/s/ By KENNETH P. SHORT,
Attorneys for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed April 14, 1954.

[Title of District Court and Cause.]

PRE-TRIAL STIPULATION

It Is Hereby Agreed and Stipulated by and between counsel of record in the above entitled cause that the following matters are agreed to with reference to the admission of evidence at the time of trial of this cause:

1. The following letters were transmitted between the addressee and sender as indicated on each letter, and each may be admitted into evidence without any further testimony thereon:

(a) Letter dated April 7, 1952, from plaintiff to defendant corporation (original to be produced by defendants).

(b) Letter dated April 8, 1952, from defendant to plaintiff enclosing check No. 40092 in the sum of \$2,048.22 (original is Exhibit 7 to the discovery deposition of plaintiff).

(c) Letter dated July 12, 1951, from plaintiff to L. C. Turcotte (defendants to produce the original).

(d) Letter dated November 21, 1951, from plaintiff to defendant (original to be produced by the defendants).

(e) Letter dated November 24, 1950, from the plaintiff to the defendant (original to be produced by the defendant).

(f) Letter dated September 21, 1951, from the plaintiff to the defendant (original is Exhibit No. 3 to plaintiff's discovery deposition).

(g) Letter dated October 10, 1951, from defendant to plaintiff (copy is Exhibit No. 4 to plaintiff's discovery deposition).

(h) Letter dated October 3, 1951 from Turcotte to plaintiff (copy is Exhibit No. 5 to plaintiff's discovery deposition).

(i) Letter dated October 15, 1951, from plaintiff to defendants (original is Exhibit No. 6 to plaintiff's discovery deposition).

(j) Letter dated June 5, 1953, from plaintiff to defendant (original is Exhibit No. 9 to plaintiff's discovery deposition).

(k) Letter dated June 26, 1953, from plaintiff to the defendant (original is Exhibit No. 10 to plaintiff's discovery deposition).

(l) Letter dated July 14, 1953, from L. Turcotte

to plaintiff, copy of which is Exhibit No. 11 to plaintiff's discovery deposition.

(m) Group of 17 letters which are Exhibit No. 12 to plaintiff's discovery deposition.

(n) Letter dated June 21, 1946, from L. Turcotte to R. H. Evans (original is Exhibit No. 17 to defendant Turcotte's discovery deposition).

(o) Letter dated May 17, 1946, from L. Turcotte to Evans, McLaren & Lane (original is Exhibit No. 16 to defendant Turcotte's deposition).

2. The summary of the moneys paid by Bellingham Paper Products Company and Puget Sound Pulp & Timber Co. to the plaintiff O'Reilly, as shown by the books and records of those companies, may be admitted in evidence without further testimony, except that the plaintiff by so stipulating do not admit that no further moneys are due to the plaintiff O'Reilly.

3. All cancelled checks representing payments to the plaintiff by the defendant and its predecessor corporation may be admitted in evidence without further proof.

4. The record of monthly sales and commissions paid for the period from May 1947 to February 1952, now in the possession of the plaintiff, may be admitted in evidence without further testimony, if the same becomes material.

5. Exhibit "A" attached to the plaintiff's complaint may be admitted in evidence without further testimony.

6. The bill of sale from the plaintiff to the de-

fendant, dated August 17, 1946, may be admitted in evidence without further testimony.

7. Stock option agreement between the defendant corporation and the plaintiff, dated August 19, 1946, may be admitted in evidence without further testimony.

8. Stock pledge agreement, dated 20 May 1947, may be admitted in evidence without further testimony.

9. Extract of the minutes of meetings of Board of Directors of Puget Sound Pulp & Timber Co., which are Exhibit No. 14 to the deposition of the defendant Turcotte and attached to that deposition, may be admitted in evidence without further testimony.

10. A photostatic copy of the minutes of a meeting of the Bellingham Paper Products Company as the same appear in the minute book of that company will be produced by the defendants and may be admitted in evidence without further testimony.

11. Agreement dated December 1, 1947, by Mr. Turcotte and Mr. R. H. Evans in the matter of the liquidation of the Bellingham Paper Products Company will be produced by the defendants and may be admitted in evidence without further testimony.

12. A file containing correspondence furnished by the witness G. H. Nelson of the Salinas Valley Wax Paper Company, which said file is now in the possession of the plaintiff, is a supplement to the deposition of the said G. H. Nelson and will be produced by the plaintiff if the same becomes ma-

terial and may be admitted in evidence without further testimony.

13. Paragraph IV of the plaintiff's second cause of action shall be deemed to have been denied by the defendant's pleadings.

14. Copy of letter dated May 6, 1946, from plaintiff to R. H. Evans may be admitted without further testimony if the same becomes material.

Dated this 19th day of July, 1955.

RUMMENS, GRIFFIN, SHORT &
CRESSMAN,

/s/ By KENNETH P. SHORT,

Counsel for Plaintiff

EVANS, McLAREN, LANE,
POWELL & BEEKS,

/s/ By VAUGHN E. EVANS,

Counsel for Defendants

[Endorsed]: Filed July 21, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be it remembered, this matter came on duly and regularly for trial and was tried before the undersigned Judge of the above entitled court sitting without a jury in the City of Bellingham on July 21 and July 22, 1955, the plaintiff appearing in person and by counsel and the defendant Lawson Turcotte appearing in person and said defendant and

the defendant Puget Sound Pulp & Timber Co., a corporation, appearing by their counsel and the court having heard and considered the evidence of each party, both oral and documentary and having on July 25, 1955 heard the arguments of respective counsel and having on said date rendered its oral opinion, now therefore, the premises considered, this court does make the following

Findings of Fact

I.

That plaintiff is a citizen and resident of the State of California.

II.

That defendant, Puget Sound Pulp & Timber Co., is a private corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal office and place of business in Bellingham, Washington, within the jurisdiction of this court; that the defendant, Lawson Turcotte is a citizen and resident of the State of Washington residing in Bellingham, Washington within the jurisdiction of this court.

III.

That the matter in controversy herein exceeds, exclusive of interest and costs, the sum of three thousand dollars.

IV.

That on the 22nd day of May, 1946, plaintiff and defendant, Puget Sound Pulp & Timber Co., a corporation, entered into a contract in writing admitted

in evidence as Plaintiff's Exhibit No. 1, a true copy of which is attached to these Findings of Fact and Conclusions of Law and marked Exhibit "A" and made a part hereof; (that a copy of said Exhibit is also attached to the complaint and marked as Exhibit "A" thereto).

V.

That on or about the 25th day of May, 1946, the corporation to be organized pursuant said contract, to-wit: Bellingham Paper Products Company, was in fact organized as a Washington corporation immediately upon the execution of said Exhibit "A" and its stock issued as contemplated by said agreement.

VI.

That pursuant to said Exhibit "A", Bellingham Paper Products Co., a corporation, and plaintiff, in the latter part of June, 1946, entered into a contract which, although reduced to writing, was not in fact signed by the parties thereto; that said unsigned contract is admitted in evidence as plaintiff's Exhibit No. 3 and is attached to these Findings of Fact and Conclusions of Law as Exhibit "B" and by this reference made a part hereof; (that a copy of said Exhibit is also attached to the complaint and marked as Exhibit "B" thereto); that said Exhibit states all of the terms and conditions of the agreement between plaintiff and said Bellingham Paper Products Company; that said contract was formally ratified, approved and adopted by the Board of Directors of said Bellingham Paper Products Co. on June 27, 1946.

VII.

That the stock of said Bellingham Paper Products Co. was issued 75% to defendant Puget Sound Pulp & Timber Co. and 25% to plaintiff; that in November, 1947 the defendant Puget Sound Pulp & Timber Co. purchased from plaintiff all of his stock in said Bellingham Paper Products Co. and became the sole stockholder thereof; that thereafter and on or about December 15, 1947 the defendant corporation, as sole stockholder, dissolved Bellingham Paper Products Co. and in the dissolution thereof acquired all of the rights and assets of said dissolved corporation and assumed all of the liabilities, duties and obligations of said Bellingham Paper Products Co., including the rights, duties and obligations specified in said Exhibit "B" attached hereto; that the defendant Puget Sound Pulp and Timber Co. assumed the obligations to plaintiff under said Exhibit "B" by written, signed agreement dated December 1, 1947 between Lawson Turcotte and Robert H. Evans as liquidating trustees of Bellingham Paper Products Co. on the one hand and the defendant Puget Sound & Timber Co., on the other, which written agreement is in evidence as plaintiff's Exhibit No. 10.

VIII.

That upon the dissolution of Bellingham Paper Products Co. and the acquisition of its assets and liabilities by the defendant Puget Sound Pulp & Timber Co., the operation and functions of said dissolved corporation were integrated into the oper-

ation of the defendant Puget Sound Pulp & Timber Co. and became thereafter known as the Paperboard Division of said Puget Sound Pulp & Timber Co.

IX.

That plaintiff fully performed all of the conditions and obligations by him to be performed under said contracts, Exhibits "A" and "B" attached from the inception thereof down to and including the 29th day of February, 1952 upon which latter date said contracts were mutually terminated by plaintiff and defendant Puget Sound Pulp & Timber Co.; that from the commencement of production by Bellingham Paper Products Co. in May, 1947 until its dissolution on December 15, 1947, Bellingham Paper Products Co. paid unto plaintiff in accordance with Exhibit "B", 3% of the net sales of said corporation; that from December 15, 1947 until and including December 31, 1948, defendant Puget Sound Pulp & Timber Co. paid unto plaintiff 3% of the net sales of the Paperboard Division of defendant Puget Sound Pulp & Timber Co. pursuant to said contracts, Exhibit "A" & "B".

X.

That in December, 1948 or January, 1949, plaintiff, without consideration or promise of consideration, advised defendant Puget Sound Pulp & Timber Co. that he would temporarily reduce his commission to 1½% of net sales of the Paperboard Division of defendant corporation and would in effect, postpone collection of the remainder thereof.

That commencing with January 1, 1949 defendant Puget Sound Pulp & Timber Co. commenced paying to plaintiff and plaintiff received from said defendant, monthly commission payments at the **rate of 11½%** of the net sales of the Paperboard Division of defendant corporation. That said practice continued monthly down to and including February 29, 1952. That said reduction in plaintiff's commission from 3% to 11½% of the net sales of said Division was without consideration or promise of consideration. That between the inclusive dates of January 1, 1949 to and including February 29, 1952 defendant Puget Sound Pulp & Timber Co. paid unto plaintiff the gross sum (before income tax withholding and old age benefit deductions) of \$59,572.04, which sum is equivalent to 11½% of net sales of said Paperboard Division during said period instead of the 3% of net sales provided for in Exhibits "A" & "B" attached hereto. That a detailed breakdown of said payments is attached hereto as Exhibit "C" and by this reference made a part hereof.

XI.

That in the fall of 1950 plaintiff notified defendant Puget Sound Pulp & Timber Co. that he was contemplating the installation of a paperboard mill in Richmond, California. In July, 1951 the management of the defendant corporation deemed such proposed venture by plaintiff to be incompatible with his future employment with defendant corporation; that in the latter part of July, 1951, plaintiff (contending that his services should terminate

effective December 31, 1952) and defendant corporation through defendant, Turcotte (contending plaintiff's services should terminate September 1, 1951) orally stipulated and agreed that the services of plaintiff should terminate as of February 29, 1952. The court finds that such agreement of July, 1951 was not, nor was it intended by the parties to be, an accord and satisfaction of any of defendant corporation's indebtedness to plaintiff under said contracts, Exhibits "A" and "B". Further, the Court finds that no consideration was promised to plaintiff or received by plaintiff to support any alleged accord and satisfaction or mutual release either at this time or at any previous or later time, from the inception of of said contracts to and including February 29, 1952. The Court finds that plaintiff performed all of the conditions and obligations by him to be performed under Exhibits "A" & "B" from the inception thereof down to and including February 29, 1952; that during said inclusive dates, Puget Sound Pulp & Timber Co. did not offer to do, nor do anything which said corporation was not theretofore obligated to do under Exhibits "A" & "B".

XII.

That said proposed Paperboard mill installed by plaintiff in Richmond, California at the time of the conversations referred to in the preceding paragraph XI, had not commenced production of any products; that the first production issuing from said mill was in October or November, of 1951.

XIII.

The Court finds that there was no meeting of the minds of plaintiff and defendant corporation nor any intent on the part of either of said parties to rescind, modify, release or discharge each other by virtue of an accord and satisfaction or otherwise of or from the obligations of the contracts, Exhibits "A" & "B" attached hereto.

XIV.

The Court finds that the defendants have failed to sustain the burden of proof of its affirmative defenses of modification of Exhibits "A" & "B", of estoppel, of accord and satisfaction, of breach by plaintiff of said contracts, of mutual release, of the statute of limitations, and of the statute of frauds; that the counter-claim of the defendants was abandoned and no evidence adduced in support thereof.

To all of the foregoing defendants except and their exceptions are allowed.

Done in open Court this 15th day of August, 1955.

/s/ JOHN C. BOWEN,
Judge

Wherefore, from the foregoing Findings of Fact, this court does deduce the following

Conclusions of Law

I.

That this court is possessed of jurisdiction of the parties and to the subject matter of this action.

II.

That no consideration was promised or tendered by defendant, Puget Sound Pulp & Timber Co. nor received by plaintiff for the reduction of plaintiff's commission from 3% to 11½% of net sales of the Paperboard Division of defendant corporation, nor were there any valid agreements of any kind or nature entered into between plaintiff and defendant, Puget Sound Pulp & Timber Co., a corporation, which in any way vitiated or modified, or in any way changed or altered the duties and obligations of said defendant, Puget Sound Pulp & Timber Co., to the plaintiff herein.

III.

That there was no consideration for any alleged accord and satisfaction or release of defendant corporation's obligations to plaintiff under Exhibits "A" and "B".

IV.

That the defendants have failed to sustain the burden of proof of their affirmative defenses and each of them and of their counter-claim; that said counter-claim should be dismissed.

That the defendant Lawson Turcotte should be dismissed as a party defendant without costs; that plaintiff's second cause of action and plaintiff's third alternative cause of action, and each of them, should be dismissed.

VI.

That under his first cause of action, plaintiff is entitled to judgment from and against the defend-

ant Puget Sound Pulp & Timber Co. in the sum of \$59,572.04, ~~together with interest at 6% per annum until paid on each unpaid monthly amount which became due him as the same accrued in accordance with Exhibit "C" attached hereto, commencing with the 1st day of February, 1949 and on each installment thereafter up to and including the installment due plaintiff for the month of February, 1952, [J.C.B.] together with plaintiff's costs and disbursements taxable herein.~~

To all of the foregoing defendants except and their exceptions are allowed, and plaintiff excepts to the Court's disallowance of interest in the words stricken out above, and his exception is allowed.

Done in open court this 15th day of August, 1955.

/s/ JOHN C. BOWEN,
Judge

Rummens, Griffin, Short & Cressman &
Max Bernbaum

/s/ By Kenneth P. Short,
Attorneys for Plaintiff

[Printer's Note: Exhibit A and B attached hereto are duplicates of Exhibit A and B attached to Complaint set out at Pages 9 to 19.]

EXHIBIT "C"

Payments received by plaintiff from defendant Puget Sound Pulp & Timber Co., covering the period January, 1949 to February 29, 1952:

| | Month | Net Commission |
|------|------------|----------------|
| 1949 | Jan. | \$1,054.63 |
| | Feb. | 807.57 |
| | Mar. | 1,105.98 |
| | Apr. | 1,158.45 |
| | May | 1,245.07 |
| | June | 1,345.92 |
| | July | 1,118.30 |
| | Aug. | 1,556.08 |
| | Sept. | 1,277.52 |
| | Oct. | 1,408.47 |
| | Nov. | 1,154.36 |
| | Dec. | 1,088.68 |
| 1950 | Jan. | 1,181.23 |
| | Feb. | 1,454.57 |
| | Mar. | 1,372.01 |
| | Apr. | 1,392.48 |
| | May | 1,312.38 |
| | June | 1,603.57 |
| | July | 1,498.32 |
| | Aug. | 1,899.77 |
| | Sept. | 1,621.73 |
| | Oct. | 1,743.93 |
| | Nov. | 1,537.47 |
| | Dec. | 1,721.74 |
| 1951 | Jan. | 2,166.00 |
| | Feb. | 1,751.36 |
| | Mar. | 1,790.78 |
| | Apr. | 1,688.54 |
| | May | 1,990.07 |
| | June | 1,914.12 |
| | July | 2,185.90 |

son and by counsel and the defendant Lawson Turcotte appearing in person and said defendant and the defendant Puget Sound Pulp & Timber Co., a corporation, appearing by their counsel and the court having heard and considered the evidence of each party, both oral and documentary and having on July 25, 1955 heard the arguments of respective counsel and having on said date rendered its oral opinion, and having heretofore rendered, made and entered Findings of Fact and Conclusions of Law in conformity therewith, it is by the Court,

Ordered, Adjudged and Decreed that the above entitled cause as to the defendant Lawson Turcotte be and the same is hereby dismissed with prejudice and without costs to either party, and it is further,

Ordered, Adjudged and Decreed that the counterclaim of the defendants be and the same is hereby dismissed with prejudice; and it is further,

Ordered, Adjudged and Decreed that plaintiff have and recover from defendant Puget Sound Pulp & Timber Co., a corporation, the sum of \$59,572.04, ~~together with interest at 6% per annum on each unpaid monthly amount which became due plaintiff in accordance with Exhibit "C" attached to the Findings of Fact and Conclusions of Law, interest on the first of such monthly sums accruing from February 1, 1949 and on the last thereof from March 1, 1952 until paid, [J. C. B.] and for his costs and disbursements herein now taxed herein in the further sum of \$77.30, together with interest on said sums at the rate of 6% per annum from this date until paid, to all of which defendants except~~

and their exceptions are allowed, and plaintiff excepts to the Court's disallowance of interest in the foregoing words stricken out by the Court and his exception is allowed.

Done in open Court, this 15th day of August, 1955.

/s/ JOHN C. BOWEN,
Judge

Rummens, Griffin, Short & Cressman &
Max Bernbaum, Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Lodged Aug. 8, 1955. Filed Aug. 15, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Puget Sound Pulp and Timber Co., a corporation, and Lawson Turcotte, defendants herein, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the above entitled action on or about August 15, 1955.

Dated at Seattle, Washington, this 29th day of August, 1955.

/s/ EVANS, McLAREN, LANE,
POWELL & BEEKS,
Attorneys for Defendants

Acknowledgment of Service attached.

[Endorsed]: Filed September 7, 1955.

[Title of District Court and Cause.]

NOTICE OF CROSS APPEAL

Notice Is Hereby Given:

That Joe A. O'Reilly, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain judgment made and entered by the above entitled court in the above entitled action on the 15th day of August, 1955, insofar as said judgment fails to allow and award to plaintiff interest upon the principal sum therein awarded.

Dated this 6th day of September, 1955.

GEO. R. RUMMENS,
TRACY E. GRIFFIN,
KENNETH P. SHORT,
PAUL R. CRESSMAN,
RICHARD M. OSWALD,
MAX BERNBAUM,

/s/ By KENNETH P. SHORT,
Attorneys for Plaintiff-Cross
Appellant Joe A. O'Reilly

Acknowledgment of Service attached.

[Endorsed]: Filed September 7, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON CROSS-APPEAL

Know All Men By These Presents:

That we, Joe A. O'Reilly the Plaintiff above named, as Principal, and the United Pacific Insurance Company, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto Puget Sound Pulp & Timber Co., a corporation, and Lawson Turcotte in the just and full sum of Two Hundred Fifty and No/100 Dollars (\$250.00) for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of August, 1955.

The Condition of This Obligation Is Such, That, whereas, the District Court of the United States for the Western District of Washington, Northern Division on the 15th day of August, 1955, in the above entitled action and Court, entered its judgment whereby said plaintiff have and recover from defendants Puget Sound Pulp & Timber Co., a corporation, the sum of \$59,572.04 together with costs and disbursements of \$77.30 but disallowing the interest claim.

And Whereas, The above named Principal has heretofore given due and proper notice that he cross-appeals from the amount of said judgment to

[Title of District Court and Cause.]

ORDER

Upon the foregoing stipulation, it is hereby

Ordered that the court's order approving the defendants' supersedeas bond heretofore entered, is vacated, and it is further

Ordered that said bond is canceled and held for naught and may be withdrawn by the defendants from the records and files of the clerk of this court.

Done in Open Court this 13th day of September, 1955.

/s/ JOHN C. BOWEN,
United States District Judge

Approved and Presented by:

/s/ RAYMOND W. HAMAN,
Of Attorneys for Defendants

Approved, Consent to Entry, and Notice of Presentation Waived:

/s/ KENNETH P. SHORT,
Of Attorneys for Plaintiff

Received the supersedeas bond in the foregoing action this 19th day of September, 1955.

/s/ J. ALLAN EVANS

[Endorsed]: Filed September 13, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally, acknowledge that we and our personal representatives are bound to pay to Joe A. O'Reilly the sum of Two Hundred Fifty Dollars (\$250.00).

The condition of this bond is that,

Whereas, the defendants have appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed September 6, 1955, from the judgment of this court entered August 15, 1955, if the defendants shall pay all costs adjudged against them if the Appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this bond is to be void, but if the defendants fail to perform this condition, payment of the amount of this bond shall be due forthwith.

Sealed with our seals this 12th day of September, 1955.

PUGET SOUND PULP & TIMBER
CO.,

LAWSON TURCOTTE,

By EVANS, McLAREN, LANE,

POWELL & BEEKS,

/s/ By W. BYRON LANE, Their Attorneys
HARTFORD ACCIDENT AND IN-
DEMNITY COMPANY,

/s/ By JACK GRIFFIN,

Attorney-in-Fact

[Seal]

[Endorsed]: Filed September 13, 1955.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD
AND STATEMENT OF POINTS

Designation of Record to be Transmitted
on Appeal

Comes Now the defendant, Puget Sound Pulp & Timber Company, and, pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, designates the entire record as necessary and material to be considered upon this appeal.

Statement of Points Upon Which Appellant
Relies

Comes Now the defendant, Puget Sound Pulp & Timber Company, and states the following points upon which it relies upon this appeal:

1. The District Court erred in holding that the contract of May 22, 1946 (Plaintiff's Exhibit No. 1) was a five-year employment contract.

2. The District Court erred in holding that the unsigned contract between plaintiff and defendant's predecessor (Plaintiff's Exhibit No. 3) constituted an enforceable contract for employment for five years under the Statute of Frauds of the State of Washington.

3. The District Court erred in holding that the plaintiff had an enforceable written employment contract for five years commencing in May of 1947, which defendant could not terminate.

4. The District Court erred in holding that a contract cannot be modified by mutual consent of all parties.

5. The District Court erred in holding that a new or independent consideration is necessary to effect a modification of an executory contract.

6. The District Court erred in failing to hold that the plaintiff's conduct estopped him from asserting a claim for additional compensation.

7. The District Court erred in holding plaintiff's secret and unexpressed intention as to the meaning of his contract with the defendant, as binding upon the defendant.

8. The District Court erred in holding that the agreement to accept, and the acceptance by the plaintiff, of compensation for six months after he left the defendant's employment, were not an accord and satisfaction of all claims for compensation due the plaintiff.

9. The District Court erred in failing to hold the agreement of July 1951 as a binding mutual release of the plaintiff's and defendant's obligations to one another.

10. The District Court erred in failing to hold the plaintiff's claim, as based upon Plaintiff's Exhibit No. 1, barred by the six-year Statute of Limitations of the State of Washington.

11. The District Court erred in failing to find the plaintiff had not breached his employment contract by organizing and operating a competitive company.

12. The District Court's finding that in January 1949, the plaintiff temporarily reduced his compensation by one-half and, in effect, postponed the collection of the remainder thereof, is clearly erroneous, and is not supported by an iota of evidence.

PUGET SOUND PULP & TIMBER
CO., Defendant

/s/ By VAUGHN E. EVANS,
Of Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed October 7, 1955.

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF RECORD
AND STATEMENT OF POINTS

Comes Now plaintiff, Joe A. O'Reilly, and, pursuant to rule 75(a) of the Federal Rules of Civil Procedure, designates the entire record as necessary and material to be considered upon the appeal and cross-appeal.

Statement of Points Upon Which Appellee-
Cross Appellant Relies

Comes Now plaintiff, Joe A. O'Reilly, and states the following point upon which he relies upon cross-appeal:

1. The District Court erred in disallowing interest upon the judgment and in eliminating the

provision therefor in plaintiff's proposed form of findings of fact, conclusions of law, and judgment.

JOE A. O'REILLY, Plaintiff
/s/ By KENNETH P. SHORT,
Of Attorneys for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed October 7, 1955.

[Title of District Court and Cause.]

STIPULATED FACTS IN NARRATIVE FORM
FOR CONSIDERATION ON APPEAL

It Is Hereby Agreed and Stipulated by and between counsel of record for both parties that the following facts may be considered by the Court on appeal as admitted and true:

1. Defendant, Puget Sound Pulp & Timber Company, a corporation, is, and at all times material to this lawsuit was, in the business of manufacturing pulp for paper manufacturers and certain other uses.

2. The plaintiff, Joe O'Reilly, is an individual.

3. All Exhibits offered by both litigants were admitted in evidence and may be considered by the Court upon this appeal.

4. The Bellingham Paper Products Company became a corporation licensed to do business in the State of Washington in the month of June, 1946.

5. The plaintiff was one of the incorporators of the Bellingham Paper Products Company and ac-

quired twenty-five percent of the common stock in exchange for a machine for making paper board, valued at \$48,000.00, and \$2,000.00 in cash. The defendant, Puget Sound Pulp & Timber Company, acquired seventy-five percent of the initial common stock for the cash sum of \$150,000.00.

6. The Bellingham Paper Products Company employed the plaintiff as its sales agent in accordance with the terms of plaintiff's Exhibit 3, but said document was never signed by any of the parties. The parties, however, do not dispute that the terms set forth in plaintiff's Exhibit 3 are the terms of the plaintiff's employment contract.

7. The Bellingham Paper Products Company began producing paper board in May of 1947. The plaintiff was paid three percent of the net sales as compensation for his services, beginning with the month of May, 1947, and continued at such rate until January, 1949, at which time he began receiving compensation at the rate of one and one-half percent of the net sales until February 29, 1952. The true conditions under which the plaintiff began receiving the lesser rate of compensation is in dispute and will be covered by the transcript of testimony in question-and-answer form.

8. The Bellingham Paper Products Company was dissolved on December 15, 1947. Defendant Puget Sound Pulp & Timber Company paid the plaintiff \$135,000.00 in cash for his one-fourth interest in the Bellingham Paper Products Company and the defendant Puget Sound Pulp & Timber Company then took over the former operation of

the Bellingham Paper Products Company as a division of the defendant company. The plant was thereafter operated by the Puget Sound Pulp & Timber Company throughout the remaining period material to this lawsuit.

9. In July of 1951, an arrangement was reached between the plaintiff and the defendant as to the termination of the plaintiff's employment for the defendant. The circumstances surrounding this arrangement and what agreements, if any, were entered into, are in dispute and the record thereon will be covered in question-and-answer form.

Dated this 3rd day of October, 1955.

/s/ KENNETH P. SHORT,

Of Attorneys for Plaintiff

/s/ VAUGHN E. EVANS,

Of Attorneys for Defendant

[Endorsed]: Filed October 7, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of

Civil Procedure, I am transmitting herewith all of the original documents and papers in the file dealing with the above cause as the record on appeal herein from the Judgment filed August 15, 1955 to the United States Court of Appeals for the Ninth Circuit, at San Francisco, said papers being identified as follows:

1. Complaint, filed September 18, 1953.
2. Marshal's Return on Summons, filed October 10, 1953.
3. Appearance of Defendant Puget Sound Pulp and Timber Company, filed October 24 1953.
4. Motion to Dismiss Plaintiff's Complaint, filed October 24, 1953.
5. Appearance of Defendant Lawson Turcotte, filed October 24, 1953.
6. Motion to Dismiss Plaintiff's Complaint, filed October 24, 1953.
7. Bond for Costs, Non-Resident Plaintiff, filed November 12, 1953.
8. Notice of filing Cost Bond for Non-Resident Plaintiff, filed November 13, 1953.
9. Notice of Motion, filed December 18, 1953.
10. Motion for production of documents under Rule 34, filed December 18, 1953.
11. Affidavit in support of Motion, filed December 18, 1953.
12. Answer, Affirmative Defenses and Counterclaim, filed December 18, 1953.
13. Stipulation re continuance of hearing on Motion for production of documents and Order, filed January 5, 1954.

14. Motion to Strike, filed February 18, 1954.
15. Plaintiff's Motion for more definite statement, filed February 18, 1954.
16. Motion to Dismiss Counterclaim, filed February 18, 1954.
17. Motion for production of documents, filed February 18, 1954.
18. Affidavit in support of Motion to Produce, filed February 18, 1954.
19. Notice of Motions, filed February 18, 1954.
20. Plaintiff's Memorandum in support of Motion to Dismiss Counter-Claim and to Strike and Motion for more definite statement, filed April 2, 1954.
21. Defendants' Memorandum of Authorities in opposition to Plaintiff's Motion to Strike, filed April 7, 1954.
22. Reply, filed April 14, 1954.
23. Pre-trial discovery deposition of Lawson P. Turcotte taken at request of Plaintiff, and Pre-trial deposition of Joe A. O'Reilly taken at request of defendants, filed October 16, 1954.
24. Notice of filing deposition, filed October 30, 1954.
25. Stipulation, filed November 18, 1954.
26. Notice of taking deposition upon oral examination (Gay Nelson), filed December 11, 1954.
27. Notice of taking deposition upon oral examination (John H. Frankl), filed December 11, 1954.
28. Deposition of John H. Frankl, filed January 22, 1955.

29. Depositions of Thomas Guy Emmons and Gaylord Nelson, filed February 19, 1955.

30. Notice of filing deposition (Lawson P. Turcotte), filed July 12, 1955.

31. Notice of filing deposition (John H. Frankl), filed July 12, 1955.

32. Notice of filing deposition (Thomas G. Emmons), filed July 12, 1955.

33. Notice of filing deposition (Gaylord Nelson), filed July 12, 1955.

34. Praecipe for Subpoena Duces Tecum, filed July 19, 1955.

35. Defendants' Trial Memorandum, filed July 21, 1955.

36. Plaintiff's Trial Memorandum, filed July 21, 1955.

37. Pre-Trial Stipulation, filed July 21, 1955.

38. Marshal's Return on Subpoena Duces Tecum, filed July 28, 1955.

39. Copy of proposed Findings of Fact and Conclusions of Law, lodged August 6, 1955.

40. Court Reporter's copy of Oral Decision, filed August 11, 1955.

41. Findings of Fact and Conclusions of Law, filed August 15, 1955.

42. Judgment, filed August 15, 1955.

43. (Supersedeas Bond withdrawn by Court Order on September 13, 1955.)

44. Notice of Appeal, filed September 7, 1955.

45. Notice of Cross Appeal, filed September 7, 1955.

46. Bond for costs on Cross Appeal, filed September 7, 1955.

47. Stipulation regarding withdrawal and substitution of Supersedeas Bond and Order, filed September 13, 1955.

48. Order, filed September 13, 1955.

49. Bond for Costs on Appeal, filed September 13, 1955.

50. Order re Exhibits, filed October 6, 1955.

51. Designation of Record on Appeal and Statement of Points upon which Appellant relies, filed October 7, 1955.

52. Stipulated facts in narrative form for consideration on Appeal, filed October 7, 1955.

53. Designation of Record and Statement of Points upon which Appellee relies, filed October 7, 1955.

I further certify that the following is a true and correct statement of all expenses, costs, and fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to-wit: Filing fee, Notice of Appeal, \$5.00, and that said amount has been paid to me by counsel for appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Bellingham, this 12th day of October, 1955.

[Seal]

MILLARD P. THOMAS,
Clerk

/s/ By MARJORIE J. EDQUIST,
Deputy Clerk

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith, supplemental to the record on appeal in the above cause, the following additional document:

54. Court Reporter's Transcript of Proceedings at trial, July 21, 22 and 25, 1955, filed September 7, 1955.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Bellingham, this 13th day of October, 1955.

[Seal] MILLARD P. THOMAS,
 Clerk

/s/ By MARJORIE J. EDQUIST,
 Deputy Clerk

In the District Court of the United States, Western
District of Washington, Northern Division

No. 125 (In Bellingham)

JOE A. O'REILLY, Plaintiff,

VS.

PUGET SOUND PULP AND TIMBER CO.,
a corporation, and LAWSON TURCOTTE,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable John C. Bowen, District Judge. [1*]

* * * * *

JOE A. O'REILLY

called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * * [5]

Q. (By Mr. Short): And what is your present employment or occupation?

A. I am the sales manager for the paperboard of the California Container Corporation, which is a wholly owned subsidiary of the Container Corporation of America. * * * * *

Q. (By Mr. Short): How long have you been the sales manager in the paperboard division of the California Container Corporation? [6]

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Joe A. O'Reilly.)

A. I would say two and a half years or a little longer.

Q. That mill is located, is it not, in Richmond, California?

A. No. It is in Los Angeles, California. There is also a mill in Tacoma, Washington.

Q. All right. Now, prior to your entering into any contract with the Puget Sound Pulp and Timber Company in 1946, will you tell the Court what your occupation was just prior to that time, that is to say prior to May 22, 1946?

A. Well, I purchased and operated a folding carton business in Tacoma, Washington, under the name of the Standard Carton Company, and in 1944 I constructed a paperboard mill in that city, which was operated under the same name.

Q. How long prior to May 22, 1946, were you in the paper carton business?

A. Oh, approximately three years before 1928, which would be about a total of 20 years prior to 1946.

Q. Approximately 20 years prior to 1946?

A. That is right.

Q. All right. And what was the general nature of the business of Standard Carton Company? What did it produce? [7]

A. Folding paper boxes.

Q. Were you during that period of time a customer in any way of Puget Sound Pulp and Timber Company?

A. Not directly. I believe that at one time I

(Testimony of Joe A. O'Reilly.)

purchased two carloads of pulp for shipment to a paperboard mill in Longview.

Q. But that would not be the normal course of the Standard Carton Company's business?

A. No.

Q. Did you have any conversations with any representative of Puget Sound Pulp and Timber Company prior to the execution of this contract of May 22, 1946?

A. Over a period of approximately a year and a half I talked to Mr. Roberg mostly about the project of building a paperboard mill in Bellingham.

Q. Do I understand then that your original negotiations and discussions with the representatives of the defendant Puget Sound Pulp and Timber Company were not originally in reference to your becoming an employee of that concern, is that correct?

A. No, they were not.

Q. What was the general plan discussed that ultimately evolved into this contract?

A. I owned a paperboard machine in Watertown, New York, which I intended to install in a board mill yet to [8] be erected, and——

Q. (Interposing): In Bellingham?

A. Well, in some place. I approached the Puget Sound Pulp and Timber Company with the idea of buying a piece of ground adjacent to the pulp mill and making a contract to buy slush pulp and steam from them.

Q. And where physically, in reference to the

(Testimony of Joe A. O'Reilly.)

property of Puget Sound Pulp and Timber Company, was it anticipated that you would erect this mill?

A. Well, I suggested that possibly I could buy a portion of their land or occupy the original pulp mill building which was then not being used.

* * * * * [9]

Q. Now, was that plan, that is to say of your occupying a building of the defendant corporation, was that plan abandoned in these discussions?

A. Yes, it was.

Q. And what supplanted that suggestion?

A. A plan was evolved and agreed on to form a new corporation which would build a building on the property of Puget Sound Pulp and Timber Company on a lease basis, [11] install this machinery that I had, and a corporation would be formed of which I would have twenty-five percent.

Mr. Short: I am now offering pursuant to the stipulation Plaintiff's Exhibit 1, being a contract which is attached to the complaint and identified as Exhibit A to the complaint. * * * * * [12]

The Court: Plaintiff's Exhibit 1 is now admitted.

* * * * *

Q. (By Mr. Short): Mr. O'Reilly, pursuant to Plaintiff's Exhibit 1, the agreement between yourself and Puget Sound Pulp and Timber Company dated May 22, 1946, apparently requires your contribution of certain items to the capital of the corporation designated therein as Bellingham Paper

(Testimony of Joe A. O'Reilly.)

Products Company, a corporation to be organized by the parties. Do you recall that?

A. Yes.

Q. Did you contribute those items to the Bellingham Paper Products Company pursuant to that agreement? A. Yes, I did. * * * * * [13]

The Court: Plaintiff's Exhibit 2 is admitted.
* * * * * [14]

Q. (By Mr. Short): The contract, Exhibit 1, between yourself and the defendant corporation of May 22, 1946, further apparently anticipated your contributing some \$2,000.00 in cash?

A. Yes, it did.

Q. Did you make that contribution?

A. Yes, I did. * * * * *

Q. (By Mr. Short): Mr. O'Reilly, you are about to be handed what has been marked for identification as Plaintiff's Exhibit 3. Do you recognize that instrument? A. Yes. [16]

Q. What is it?

A. It is an agency agreement between the Bellingham Paper Products Company and myself.

Mr. Short: May I say to the Court that the witness now has in his hand what is pleaded in the complaint as an attachment, Exhibit B.

* * * * * [17]

Q. (By Mr. Short): Mr. O'Reilly, are there signatures on the signature page of that document?

A. This document is not signed.

Q. Is that the only such document or did you

(Testimony of Joe A. O'Reilly.)

ever have any other copy of that document furnished to you by the defendant or by Bellingham Paper Products Company?

A. There are several copies in existence, but this [18] is the only one that I have.

Q. Was the original of that document signed by you? A. It was my impression that it was.

Q. Can you state whether or not it was signed by any officer of the Bellingham Paper Products Company?

A. I think that it was at the same time.

Q. If you recall, can you state when the signatures were affixed to that document?

A. I can't recall specifically.

Q. Do you recall in addition to yourself who the signer on behalf of Bellingham Paper Products Company was?

A. It would probably be Mr. Roberg as the President.

Q. Was Mr. Roberg the President of Bellingham Paper Products Company?

A. Yes, he was.

Q. What capacity or office, if any, did he hold with Puget Sound Pulp and Timber Company?

A. Vice President.

The Court: Was he mentioned as an original incorporator in the Articles or otherwise in the original papers creating the corporation?

Witness: I think that he was.

Mr. Short: May the record now show, if the Court please, that I have made demand and also

(Testimony of Joe A. O'Reilly.)

issued a subpoena on the defendants for production [19] of this document and have been advised that no original——

The Court: (Interposing) Relating to what paper as an exhibit number?

Mr. Short: Exhibit 3, if the Court please, which the witness now has in his hand.

Q. (By Mr. Short): Now, Mr. O'Reilly——

Mr. Short: The plaintiff offers Plaintiff's Exhibit 3 for identification.

Mr. Evans: I am going to object to it, Your Honor, as not being competent as a copy of a written contract signed by the parties or party to be charged.

So far as it might be a memorandum which sets forth what the parties actually agreed to but never signed, we would have no objection, but if it is offered or purports to be offered as a written signed contract, I object to it.

I further object to it because of the stapled on notation on the last page, the handwritten little note which is attached to it, which has not been identified, and it certainly looks out of place there, There has been no comment on it.

The Court: It seems to me counsel on both sides in the future would anticipate objections to information [20] written on a document to be offered which may not have been a part of it when it was executed.

Mr. Short: In reference to that matter of the memorandum attached, I call attention to the state

(Testimony of Joe A. O'Reilly.)

of the pleadings on that matter; that is to say, there is pleaded and attached to the complaint as Exhibit B this document, including the matters to which counsel just referred as being penciled notations, and the answer of the defendants admits that that Exhibit B is a true and correct copy of the agreement between the parties, and that it is an agreement, in those words, and denies only its execution as a signed document.

Mr. Evans: May it please the Court, the copy of Exhibit B to the complaint as served upon my client contains no such stapled on notation as I see it in my file here.

Mr. Short: Well, it is not stapled, no, in handwriting on Exhibit B. It is typed on Exhibit B that is attached to the complaint.

May I see that exhibit a moment?

(Whereupon Plaintiff's Exhibit 3 for identification is handed to Mr. Short by the bailiff.)

Mr. Short: The handwritten language, if it please the Court, reads—— [21]

The Court: (Interposing) Well, I would not read it. Let it be compared.

Mr. Short: I may say it is the sentence beginning on line 4 and ending on line 6 of page 3 of Exhibit B.

The Court: One way of validating that statement is to have some witness identify it, if there is any such witness available.

Mr. Short: Very well. I will do that. If you will hand it to the witness and—Mr. Evans, will you

(Testimony of Joe A. O'Reilly.)

produce, in accordance with the stipulation, the last document in our stipulation, No. 14, the letter of May 6, 1946—Excuse me. That is not what I want. Item No. (n) on page 2 of the stipulation, letter dated June 21, 1946 from Mr. Turcotte to Mr. Evans. * * * * * [22]

The Court: Plaintiff's Exhibit 4 is now offered. It is admitted. * * * * * [24]

Q. (By Mr. Short): Mr. O'Reilly, do you notice the penciled notation on the Exhibit 3 you have in your hand? A. Yes, I do.

Q. Can you tell the Court in whose handwriting that penciled notation is?

A. It is in my handwriting. * * * * * [25]

Mr. Short: I will reoffer Exhibit 3 for identification.

Mr. Evans: I have no objection to it being admitted if it is limited to the terms of what the parties agreed to. I do have objection if it is offered for the purpose of a written contract. We are perfectly agreeable to admitting that we agree to what it says in this piece of paper are the terms of the agreement, but we do not want any inference—and I want the record to show this—that that agreement was ever signed.

Mr. Short: Do I understand that you do not object to what has been referred to as the penciled notation as being a part of the agreement between the parties?

Mr. Evans: We do not object to that. We agree that that was a part of the terms of the agreement,

(Testimony of Joe A. O'Reilly.)

but we do not want any inference that it was ever signed.

Mr. Short: The only method I know to get the terms before the Court is to place the document in evidence, and it is so offered.

The Court: You do not accept the limitation?

You offer it as the contract which was in fact executed by the parties?

Mr. Short: Yes, I do, Your Honor.

The Court: The Court does not believe the testimony so far properly authenticates execution of the document by anyone.

Mr. Bernbaum: May I address the Court?

The Court: I prefer to hear Mr. Short.

Mr. Short: In view of the fact that the contents of this exhibit by admission are the terms of a valid contract between the parties in itself would require its admission in evidence. The only significance attached to whether or not it is executed by the parties——

The Court: (Interposing) You have not authenticated it for admission as the executed contract. You may be able to do so by this witness by further interrogation so far as I know, but I am only saying that you have not established execution of it as a physical thing. You have not so established it.

Mr. Short: So there shall be no confusion about it, I have no further evidence on the fact of affixing signatures than that that has already been produced.

The Court: The Court in this connection would

(Testimony of Joe A. O'Reilly.)

deem [27] it material, if counsel were so advised, to inquire of the witness if anything was done by the parties, either one or both of them, pursuant to this thing which is marked Plaintiff's Exhibit 3.

Mr. Short: That evidence will be introduced. There is no question about that.

The Court: Well, the Court will await that evidence before ruling finally upon your offer of that exhibit.

Mr. Short: Very well.

The Court: There are more ways than merely signing a paper to authenticate its coming into being as a thing which may represent or might be contended to represent the contract in question.

Mr. Short: It would be appropriate at this point, I believe, to ask counsel if he will now produce the extract of the minutes of the Bellingham Paper Products Company upon which we have orally stipulated.

The Court: What is the response of defendants' counsel to plaintiff's demand to produce the original of Plaintiff's Exhibit 3. If it has been made known, I failed to realize it.

Mr. Evans: I didn't realize that the Court was calling upon me. [28]

The Court: The Court is reminding counsel for the defendant that there has been a demand repeated in this trial proceeding for the production of the original of Plaintiff's Exhibit 3—as I understand your demand—is that not your intention?

Mr. Short: That is correct, Your Honor.

(Testimony of Joe A. O'Reilly.)

Mr. Evans: We have made a very careful search and a thorough search and say on behalf of my clients we are unable to find any original or any duplicate signed copy of Exhibit 3. We have done everything that we know to do, gone through every file that we can find, and turned the office literally upside down, and we cannot find an executed copy.

* * * * * [29]

Mr. Short: I offer Plaintiff's Exhibit 5.

Mr. Evans: No objection.

The Court: That now is admitted.

* * * * *

The Court: Does that have anything to do with the problem which previously has surrounded Plaintiff's Exhibit 3?

Mr. Short: It does, Your Honor, and I would ask leave to read a portion of it to the Court if I might. [30]

The Court: Does it have some bearing on the authentication of Plaintiff's Exhibit 3 according to your contention?

Mr. Short: It adopts Exhibit 3 by the Board of Directors. [31]

* * * * *

Q. (By Mr. Short): Mr. O'Reilly, in reference to Plaintiff's Exhibit [32] 3 for identification, the so-called agency agreement between yourself and Bellingham Paper Products Company, will you state to the Court what, if anything, was done by you and by Bellingham Paper Products Company in performance of that Exhibit 3? * * * * *

(Testimony of Joe A. O'Reilly.)

The Court: State, if you recall, what, if anything, you did and what, if anything, the Bellingham Paper Products Company did in pursuance of that Plaintiff's Exhibit 3.

A. The Bellingham Paper Products Company erected a paperboard mill on the site of it.

The Court: How long after the coming into being of Plaintiff's Exhibit 3, if you know?

Witness: I think the work was started within two months.

Q. (By Mr. Short): That mill was erected where?

A. On the property of the Puget Sound Pulp and Timber [33] Company directly across the street from the offices.

Q. From the management or head offices of Puget Sound Pulp and Timber?

A. From the main office.

Q. And did that mill contain this machine to which you had reference?

A. The machine was shipped out and installed in the new mill.

* * * * *

(Whereupon Plaintiff's Exhibit 2 is handed to Mr. Short and then to the witness.)

Q. (By Mr. Short): Will you please make note of the date on that bill of sale in which you conveyed the machine to the Bellingham Paper Products Company? [34]

The Court: You do not have to state it. Just do

(Testimony of Joe A. O'Reilly.)

what counsel suggested. Review that statement if you wish to and then proceed.

A. (Peruses Plaintiff's Exhibit 2.)

Q. (By Mr. Short): Have you seen the date of that instrument? If you will, look at the last page.

A. Yes.

Q. Now, in reference to that date when that conveyance was made to Puget Sound Pulp and Timber Company, where was the machine at that time?

A. It was in Watertown or in transit; I am not certain.

Q. Does that bill of sale and the date thereof refresh your recollection in any manner as to the date the machine was physically installed in the Bellingham Paper Products Company building leased from the defendant corporation?

A. The installation was started shortly after this date, August 1946, August 19, and continued on for the major portion of a year before the machine was in operation.

Q. Can you tell the Court how long a time elapsed between the date of that bill of sale in August 1946 and the date that the mill or that machinery actually came into operation, that is, was actually producing paperboard? [35]

A. Approximately ten months.

Q. Can you then fix a date when in your recollection the Bellingham Paper Products Company commenced the production of paperboard in that mill?

A. In May of 1947.

Q. In the year 1947 and up until May, did you

(Testimony of Joe A. O'Reilly.)

receive any moneys from Bellingham Paper Products Company pursuant to Exhibit 3, this agency contract?

The Court: Just look at Exhibit 3, where it speaks of money passing from one to another, and after you have done that, the Court will have you reminded of the form of counsel's question.

A. Yes, I did.

The Court: Read the question.

(Whereupon the last question is read by the court reporter.)

The Court: Is your answer as previously stated?

Witness: Yes. [36]

* * * * *

Q. (By Mr. Short): Then can you now answer the question of what money you received from January 1, 1947, until May 1947 from Bellingham Paper Products Company?

The Court: In relation to what obligation, if any?

Mr. Short: In relation to the agency agreement, Exhibit 3. A. I received none.

Mr. Short: I didn't hear.

The Court: The answer was: "I received none."

Q. (By Mr. Short): Did you receive any moneys from Bellingham Paper Products Company in the calendar year 1947? A. Yes.

Q. Will you state what moneys you received?

A. I received——

The Court: (Interposing) Will you confine it to

(Testimony of Joe A. O'Reilly.)

the moneys mentioned in that contract, Plaintiff's Exhibit 3?

Mr. Short: May I restate the question?

The Court: Yes, you may.

Q. (By Mr. Short): During the calendar year 1947 did you receive any moneys from Bellingham Paper Products Company pursuant to Exhibit 3, the agency contract? A. Yes, I did.

Q. Will you now state what moneys you received?

A. I received remuneration on the basis of three percent of the gross sales.

The Court: Is there anything said in Plaintiff's Exhibit 3 about your right and the Bellingham Paper Products Company obligation to pay you that money? Answer yes or no.

Witness: Yes.

The Court: Just say on what page and what line such a statement is made.

Witness: The lines aren't numbered here, but it is line 11 on the first page of Exhibit 3.

The Court: Now, will you take time to glance through that Plaintiff's Exhibit 3, each and [38] every line and page of it, and after you have done so, the Court wishes to address to you a question as to what, if anything, did you do intending to perform any obligation on your part in that contract and what, if anything, did the other party to the contract do, the performance of which you received as and for performance by the other party to the contract of its obligations therein towards you and

(Testimony of Joe A. O'Reilly.)

for your benefit. Read it through again very carefully.

(Whereupon witness commences to read Plaintiff's Exhibit 3.)

The Court: Have you finished looking through the exhibit?

Witness: Just the first page.

Clerk: Plaintiff's Exhibit No. 6.

(Sales Commissions, etc., marked Plaintiff's Exhibit 6 for identification.)

Witness: I have finished, Your Honor.

The Court: Will you read the last question the Court stated to the witness? [39]

* * * * *

Witness: The company did build the mill as specified and employ me as its agent.

The Court: Did the company pay you any salary for work done by you for it as its agent after that?

Witness: After the operation started?

The Court: After that contract was signed and intended by it and you that your work as such agent was in pursuance of that contract?

Witness: Yes, it did. [40]

* * * * *

Q. (By Mr. Short): Mr. O'Reilly, you have been handed what has been marked for identification as Plaintiff's Exhibit 6. Will you kindly identify what that group of documents is?

A. This is a statement of sales commissions listed under various invoice numbers paid to me by the Bellingham Paper Products Company.

(Testimony of Joe A. O'Reilly.)

Q. And what period of time do those statements cover? Will you go through them for a moment?

A. (Examines Plaintiff's Exhibit 6.)

Q. To rephrase the question, commencing on what [41] date and ending on what date do those statements of commissions cover?

A. They start in May 1947 and go through the first fifteen days of December, 1947.

Q. And is there one for each month intervening?

A. Yes, apparently there is.

* * * * *

Q. (By Mr. Short): Now, Mr. O'Reilly, did you in fact receive a check for the amount shown on each of these sheets as that sheet was furnished to you by the Bellingham Paper Products Company?

A. I believe that I did. These apparently are accurate.

Q. And those were furnished to you by the company, by the Bellingham Paper Products Company?

A. Yes.

Mr. Short: I will offer in evidence Plaintiff's Exhibit 6.

Mr. Evans: May I examine on voir dire? [42]

The Court: Will you, Mr. O'Reilly, say again, if you have already stated it, on what day did you begin work for the Bellingham Paper Products Company in pursuance of the terms and conditions of Plaintiff's Exhibit 3 if you did under those circumstances begin work for that company?

Witness: After rereading that exhibit as you instructed, I find that there was a payment for part

(Testimony of Joe A. O'Reilly.)

time work starting with the first part of 1947—I think it was in January—which went up to a part of May on that \$100.00 basis.

Q. (By Mr. Short): \$100.00 per what?

A. Per week.

The Court: What do you believe to have been the day or the month or the year when you contend that that Plaintiff's Exhibit 3 was executed, if you do claim it was executed by you and by the Bellingham Paper Products Company? [43]

* * * * *

Witness: May 22, 1946, as I recall. * * * * *

Mr. Evans: As to Exhibit No. 6—May I ask the bailiff to hand it to the witness, please?

* * * * *

Mr. Evans: Mr. O'Reilly, I believe what you have in your hand is the record of sales that were made by the Bellingham Paper Products Company during [44] the period of operation up to December 15, 1947, is that correct?

Witness: Yes. * * * * *

Mr. Evans: Do you know who made—do you know [45] whether or not that original ribbon copy that you have in your hand was prepared by Puget Sound Pulp and Timber or Bellingham Paper Products or whether it was prepared by some one on your behalf?

Witness: No. It was prepared by the company, the Bellingham Paper Products Company, in the office of the Puget Sound Pulp and Timber Company. * * * * *

(Testimony of Joe A. O'Reilly.)

The Court: I do not believe that is the question. He still is asking you to be specific in stating your recollection about who made those things. Did you make them or did somebody else, and if so, under what circumstances?

Witness: The accounting department of the Puget Sound Pulp and Timber Company made these statements on behalf of the Bellingham Paper Products [46] Company.

Mr. Evans: And from whom did you receive them?

Witness: I received them from the accounting department.

Mr. Evans: When?

Witness: Well, I would say approximately the dates stated on each one or shortly thereafter.

* * * * * [47]

Mr. Short: I might say I didn't receive these from counsel. These were in my file furnished to me by the witness. Now, if that aids him or aids counsel, that is where I got them—from the witness, the plaintiff.

Witness: In view of these disclosures I would say that these are the papers that I did receive.

The Court: From time to time, at approximately the times stated as a date on each paper, or a day or two or few days after such date, is that what you mean to say?

Witness: Yes, Your Honor.

Mr. Evans: So I might be certain here—then you received the check at the same time for the

(Testimony of Joe A. O'Reilly.)

total amount of your commissions as shown on each one of those pieces of paper?

Witness: Yes. * * * * * [49]

Q. (By Mr. Short): Do I understand correctly now that the exhibit which you have in your hand, Exhibit 6, the commission statements, represents the commissions received by you from Bellingham Paper Products Company during the calendar year 1947? A. Yes. * * * * * [50]

Q. (By Mr. Short): Now, during the calendar year 1947, well, indeed, from any date after June 1946 until December 31, 1947, did [51] you receive any moneys pursuant to Exhibit 3 other or in addition to those commissions to which you have just testified?

A. Yes. Starting in January of 1947 I received \$100.00 a week, and I believe there were some various items of traveling expenses. That is up to the month of May.

Q. That is to say the \$100.00 a week is up until the month of May, is that correct?

A. Yes, including a part of the month of May.

Q. Going back to the \$100.00 a week, during January until a portion of May, 1947, during which you received the \$100.00 a week, is it your contention that that was received pursuant to and under Exhibit 3? A. Yes.

Q. And during the calendar year 1947 did you receive travel expense checks during that entire calendar year, that is from time to time?

A. Yes. * * * * * [52]

(Testimony of Joe A. O'Reilly.)

A. Mr. Roberg was the President of the Bellingham Paper Products Company and Vice President of the Puget Sound Pulp and Timber Company.

Q. And Mr. Turcotte, did he occupy any position with Bellingham Paper Products Company?

A. No, he didn't.

Q. Did he occupy any position with the Puget Sound Pulp and Timber Company?

A. He was the Executive Vice President at that time.

The Court: What company?

Witness: Puget Sound Pulp and Timber Company.

Q. (By Mr. Short): And what position does he now occupy, if you know?

A. He is the President.

Q. Very well. Now, will you please state what you did during the erection of this mill in reference to its erection? Did you play any part in it? If so, state what it was.

A. In addition to consulting with the men that were erecting the buildings and installing the machinery, I formulated the type of materials that we would produce in that mill and compiled price lists for their sale and contacted prospective customers with the idea of selling the board to them when we were in production.

Q. Prior to the installation of this board mill, [55] to your knowledge did the defendant Puget Sound Pulp and Paper Company produce any paperboard whatever?

(Testimony of Joe A. O'Reilly.)

A. No paperboard at all.

Q. So this was a new line, I take it, to their operation, is that correct?

A. Yes, it was.

Q. Now, you specified the type of board to be produced. Without getting into detail of the matter, will you simply state what that involved?

A. Well, it primarily involved paperboard produced from their unbleached natural sulphite and byproduct—a waste byproduct of the mill called screenings—with addition of bleached pulp and various other types of paper-making materials secured from other sources.

Q. Do I gather from your answer that there are different kinds of paperboard, that is different qualities and uses to which paperboard is put?

A. Yes, there are. We contemplated manufacturing approximately fifteen different kinds of paperboard in a variety of thicknesses from 16,000ths to 50,000ths of an inch in the case of every variety.

Q. Now, you testified that you contacted certain prospective customers? A. Yes.

Q. What type of concern is a customer of a paperboard [56] mill.

A. Customers would cover a wide range of varieties. One of our customers was Brown & Bigelow in Milwaukee. Another customer who did place a large order with us for 5,000 tons at \$175 a ton was the Stone Container Company of Chicago. We also sold paper to the Butler Paper Company of Chicago, with branches on the Pacific Coast, the Pa-

(Testimony of Joe A. O'Reilly.)

cific Coast Paper Company in San Francisco and Seattle, and Sierra Paper Company in Los Angeles, as well as paper box manufacturers, and other corrugated box manufacturers.

Q. They are the normal users of what you refer to as paperboard, is that correct?

A. Yes.

Q. Now, during what period of time were you traveling and contacting these prospective customers? Can you specify that?

A. Throughout most of the whole year of 1947 and thereafter. There were trips made during the construction period and after—then during the balance of the year after operations started.

Q. Now, I neglected to ask you when the Bellingham Paper Products Company was organized as a corporation and after you had contributed this machinery and money to which you have testified, were you issued stock in that corporation? [57]

A. Yes.

Q. And how many shares if you recall? And if you can't recall, what proportion of the total shares were issued to you?

A. It was 25% of the total issue. I forget the exact number of shares.

Q. And the remaining 75% were issued to whom?

A. The Puget Sound Pulp and Timber Company. * * * * * [58]

The Court: Plaintiff's Exhibit 6 is now admitted.
* * * * * [59]

(Testimony of Joe A. O'Reilly.)

Mr. Short: I will offer Exhibit 7 which is pursuant to the stipulation on file.

Mr. Evans: No objection.

The Court: Admitted.

* * * * *

Mr. Evans: No objection to its admission.

The Court: Plaintiff's Exhibit No. 8 is now admitted. [60]

* * * * *

Q. (By Mr. Short): Mr. O'Reilly, as you have testified that the last statement of commissions you received, Exhibit 6, was December 15, 1947, why was that month terminated in that manner? What occurred? [61]

A. The Bellingham Paper Products Company, as an independent corporation, was dissolved at that time.

The Court: What month and what year?

Witness: December 15, 1947. [62]

* * * * *

The Court: Do you offer Plaintiff's Exhibit 9?

Mr. Short: I offer Plaintiff's Exhibit 9.

The Court: Admitted. [63]

* * * * *

The Court: Do you offer it?

Mr. Short: I offer Exhibit 10. [64]

The Court: Admitted.

* * * * *

Mr. Short: May I ask leave of the Court to read a portion of Exhibit 9?

The Court: You may. [65]

* * * * *

(Testimony of Joe A. O'Reilly.)

Mr. Short: Now may I read a portion of Exhibit 10?

The Court: You may do that. [67]

* * * * *

Mr. Short: Now, unless counsel wish to now stipulate that the agency agreement referred to in that Exhibit 10 is Exhibit 3 now before the Court and so marked for identification—it was so stipulated in the deposition——

Mr. Evans: No, there is no doubt about the agency agreement. The oral agency agreements is what they were referring to in this exhibit.

The Court: No. Mr. Evans, I understood that Mr. Short's statement referred specifically to Plaintiff's Exhibit 3 when he mentioned agency agreement as the thing that was referred to in this statement that he just read from Plaintiff's Exhibit 10.

Mr. Evans: The terms of it—that is what they were referring to. So far as an executed, a signed agreement——

The Court: May I have that exhibit, and will you point out to the bailiff the words, Mr. Short, that you just read where the words "agency agreement" were used in the exhibit. [72]

* * * * *

The Court: All I see is little "a" within a parenthesis at the top of the third page—these pages are unnumbered—of Plaintiff's Exhibit 10, and it does not point to any physical characteristic of the thing

(Testimony of Joe A. O'Reilly.)

which now bears the Clerk's identification mark of Plaintiff's Exhibit 3.

If there is any evidence of a direct testimonial character which connects that statement with the thing which now bears the Clerk mark Plaintiff's Exhibit 3 for identification, I will be glad to know it.

Mr. Evans: May it please the Court, I think I can clear up something that appears to me the Court is in doubt about.

The defendant admits that we entered into this agreement with the plaintiff, but we never signed the agreement. We do not dispute the terms as they are set forth in Plaintiff's Exhibit 3.

The Court: Do you offer Plaintiff's Exhibit 3?

Mr. Short: I do, Your Honor.

The Court: It is now admitted for any and all purposes of which it is properly capable of being or constituting evidence. * * * * *

Q. (By Mr. Short): Mr. O'Reilly, after December 15, 1947, when the Puget Sound Pulp & Timber Company had taken over the Bellingham Paper Products Company, were your duties with the Puget Sound Pulp and Timber Company any different than [74] those that you had performed for the Bellingham Paper Products Company?

* * * * *

A. No. They were the same.

Q. Generally now, at this period of time, this mill and its machinery are in full operation, are they not?

A. Yes.

(Testimony of Joe A. O'Reilly.)

Q. You have earlier described what you had done in [75] reference to that period of time in which the mill was being set up. Would you now describe to the Court what your function was and what duties you actually performed for the defendant Puget Sound Pulp & Timber Company from December 15, 1947 on?

A. I acted as manager of the paperboard division and mill and hired the superintendent and assistant superintendent, scheduled runs of paperboard to be manufactured, and sold the production of the mill.

Q. When you refer to the paperboard division of Puget Sound Pulp and Timber, is that the same mill and function that Bellingham Paper Products Company occupied during its corporate existence?

A. Yes, it is.

Q. And what was operated by that company became the paperboard division of Puget Sound Pulp & Timber Company? A. Yes.

Q. Now, when you say you scheduled runs, would you briefly explain what that means?

A. From a clean start in the operation of a paperboard mill, the best grades of board are run first. In other words, the whitest type of fibers are used, and from there on it goes down through lower grades of paperboard, winding up with chip board or a similar material [76] made from screenings, at which time the machine and all the equipment is washed up and a new cycle is started—running the various grades, starting with the best quality. I

(Testimony of Joe A. O'Reilly.)

would combine the runs of the various grades and determine what length of time they should run and when the changes should be made of the various grades and when the wash up should occur.

Q. Do I understand that this process runs in cycles then, that you produce the different grades?

A. Yes, it does. * * * * *

Q. (Continuing) —Plaintiff's Exhibit 11. Can you tell the Court what Plaintiff's Exhibit 11 for identification is?

A. These are the statements of commissions paid to me on the sales of the paperboard starting on the 15th of December, 1947, and the last item is under the date of March 11, 1952.

Q. Well, the last item covers what commissions [77] —through what?

A. Through the month of February, 1952.

Q. And as far as you can determine, is there one for each month during those inclusive dates of December 15, 1947 to January 29, 1952, both dates inclusive? A. Yes, apparently there are.

Mr. Short: Before proceeding, I will now offer Plaintiff's Exhibit 11.

Mr. Evans: May I examine on voir dire?

The Court: You may.

Mr. Evans: Mr. O'Reilly, are these the same as Exhibit No. 6 which I have previously examined you about except they cover the period from December 15, 1947 until your termination with the Puget Sound Pulp and Timber Company?

Witness: These cover the payments directly from

(Testimony of Joe A. O'Reilly.)

Puget Sound as the others cover payment from Bellingham Paper Products Company.

Mr. Evans: Are these pieces of paper that were given to you each month which recorded the gross sales and the computations to your commission?

Witness: Yes. [78]

* * * * *

Mr. Evans: And these pieces of paper that you have in your hands are actually the ones that were received by you rather than the copies somebody else made, is that right?

Witness: Yes.

Mr. Evans: Fine.

No objection.

The Court: Admitted.

* * * * *

Q. (By Mr. Short): Mr. O'Reilly, during the period December 15, 1947 to December 31, 1948, what rate or what percentage of net sales were you paid?

A. They were computed at the rate of three percent on the net sales. [79]

* * * * *

Q. Very well. And for the remainder of the period, that is to say from January 1, 1949, to February 29, 1952, at what rate of net sales were you paid?

A. At the rate of one and one-half percent.

The Court: Is that one and one-half percent of net sales? [80]

Witness: Yes.

(Testimony of Joe A. O'Reilly.)

The Court: Did you say anything about three percent a few minutes ago?

Witness: Yes. Up to and including December of 1948 the rate was three percent, these commissions.

The Court: Up to December 1948, and thereafter it was what?

Witness: It was including December of 1948, and thereafter at one and one-half percent.

The Court: You may proceed.

Q. (By Mr. Short): You might briefly explain, if you will, Mr. O'Reilly, what the term "net sales" means, your understanding of that term.

A. The term "net sales" means the selling price of board after freight allowances and discounts.

Q. Very well. Now, can you tell the Court what incident or transaction or conversation prompted the reduction in your commission from three percent to one and one-half percent commencing in January, on January 1, 1949?

A. Well, it was a voluntary reduction or a voluntary temporary reduction.

The Court: Voluntary on whose part?

Witness: Mine.

The Court: And when did that become effective?

Witness: It became effective in January of 1949.

The Court: How much was that reduction? How long did it last and how much was it?

Witness: It was a fifty percent reduction.

The Court: Fifty percent of your one and one-half?

(Testimony of Joe A. O'Reilly.)

Witness: Yes.

The Court: You may proceed.

Q. (By Mr. Short): Did the Court ask you if it was fifty percent of one and one-half?

A. No. I understood——

The Court: (Interposing) Ask him what it is.

Mr. Short: I will ask him.

Q. (By Mr. Short): What was your reduction from January 1, 1949, on; at what percent after January 1, 1949, did you receive commissions?

A. The reduction was from three percent to one and one-half percent.

The Court: You are not talking about anything new from what you previously stated?

Mr. Short: That is correct.

The Court: You previously stated after December [82] 1948 you were paid one and one-half percent instead of three percent?

Witness: Yes.

Mr. Short: That is correct.

Q. Now, did you have a conversation with any representative of Puget Sound Pulp & Timber Company in reference to that reduction? You can answer that yes or no. A. Yes.

Q. With what representative?

A. With Mr. Roberg.

Q. And at that time when that conversation took place, what office did he hold with the defendant corporation?

A. Vice president of the Puget Sound Pulp and Timber Company.

(Testimony of Joe A. O'Reilly.)

Q. And when did that conversation take place?

A. I think it was in December of 1948.

Q. Where would that have taken place?

A. In Mr. Roberg's office at the pulp mill offices.

Q. Were any other persons present at that time?

A. No.

Q. Can you state now the substance of what you said to Mr. Roberg?

A. Well, I said to Mr. Roberg that the profits of [83] the board division weren't very substantial and I said that as a temporary measure I would reduce the commission to one and one-half percent until the operations became profitable.

Q. Did Mr. Roberg say anything in response to that?

A. As I recall, Mr. Roberg said: "That is a nice gesture."

Q. By whom was the subject first raised?

A. It was raised by me.

Q. Was there any proposal by Mr. Roberg or by any other agent of the defendant corporation made conferring any benefit upon you for your willingness to take one and one-half percent?

A. No.

Q. And do I understand that during the ensuing period until February 29, 1952, that was the amount actually paid you?

A. That was the amount actually paid.

Q. In February, on February 29, 1952, your services were terminated with the defendant corporation, were they not?

A. Yes.

(Testimony of Joe A. O'Reilly.)

Q. Can you describe to the Court how the matter of your termination of services with the defendant corporation came about? [84]

A. It was as a result of a purchase of a paperboard machine which I assumed at the time would be installed in the mill building in Bellingham and which was originally built to house two paperboard machines, and——

The Court: (Interposing) Whose purchase? Did you purchase it or did somebody else purchase it? You said it resulted from a purchase. By whom?

Witness: By me.

Q. (By Mr. Short): And when and where did you purchase it?

A. It was in Ottawa, Canada, and I think the purchase took place in 1951.

Q. Incidentally, in reference to that matter, was the building which houses the paperboard machine which you have discussed as being the one in operation at the mill, was that building built in anticipation of being a one machine or a two machine operation?

A. It was built for a two machine operation, and I continually expected to either have the pulp mill buy a machine or bring one to their attention that would be purchased and put in operation there.

Q. Now, you say that your termination came about as a result of your purchase of that machine. Would you continue now and explain about the relationship between [85] that and the matter of your termination?

(Testimony of Joe A. O'Reilly.)

A. Well, through the years I had examined different paperboard machines in various parts of the country, and in the first case they were scarce and high in price and not suitable for this job, and in this particular case I figured the machine very suitable and for sale at a good price to the extent that I personally committed myself to buy the machine.

Then I came to Bellingham and talked to—I believe that I mentioned the machine before going to Ottawa.

Q. To whom?

A. To Mr. Roberg and Mr. Turcotte.

When I came back, I had the machine and explained it and showed the blueprints and specifications to Mr. Turcotte, and he took it under advisement and I think covered the matter with the Board of Directors of the Puget Sound Pulp and Timber Company, during which time probably three months elapsed. He finally told me that they weren't interested in installing it.

That left me with the machine on my hands and the problem of handling it.

The demand for paperboard at that time was twice as great as we could supply, and I conceived the idea of installing the paperboard machine in Central California. I suggested to Mr. Turcotte that I would be able to handle [86] the sales for the paperboard division in Bellingham as well as the subsequent installation in California and handle the sales of that outfit at no injury to the volume or profit of the paperboard division of the Puget

(Testimony of Joe A. O'Reilly.)

Sound Pulp and Timber Company, but Mr. Roberg rather disagreed with that idea, and as a result, we had several different dates of ending our association in mind.

Q. When did those conversations as to your date of termination take place?

A. Well, I would say they were through the second quarter of—that would be 1951. Probably the last one took place about midyear or maybe in August.

Q. In the meantime, what disposition was made of this machine?

A. It hadn't been moved. It was still erected in Ottawa.

Q. Did you ultimately install that machine in California? A. Yes, I did.

Q. Where? A. In Richmond, California.

Q. When, if you recall?

A. Well, that was another operation that took a matter of ten to twelve months, starting about—the building operation I think started there in January of [87] 1951, and I think the mill——

Q. (Interposing) You say “the building operation.” You mean the building of the building that was to house this machine?

A. Preparing the building for the housing of the machine.

Q. And when was the first notice that the defendant Puget Sound Pulp and Timber Company had from you of the fact that you were going to make that installation?

(Testimony of Joe A. O'Reilly.)

A. I don't remember the exact date, but I think it was in the second quarter of 1951.

Q. Well, I will pass that for the moment.

When the subject matter of the date of your termination came up, with whom was that discussed?

A. With Mr. Turcotte.

Q. And that would be when?

A. I think it was about the middle of 1951.

Q. And what date were you suggesting to him as a termination date?

A. I suggested the end of December, 1952, and he suggested I think September 1st of 1951.

Q. And did you ultimately arrive at any accord on what date actually would be the termination date?

A. We arrived at a date of March 1, 1952.

Q. And from mid 1951 until that termination date, [88] where did you occupy yourself or where were you physically during those, well, we will say, eight months?

A. Most of the time I was in California.

Q. Commencing in what period of time did you most of the time maintain yourself in California?

A. Well, I had been there several times previous to, I will say, July 1st, 1951, and a slightly greater percent of the time for the balance of that year and the first two months of 1952.

Q. Now, in reference to the matter—I am now discussing the entire term of your entire contract with the defendant company and to the matter of

(Testimony of Joe A. O'Reilly.)

expenses, when you were paid expense moneys—well, let me preface that with this:

Were you paid expense moneys by Puget Sound Pulp and Timber Company? A. Yes.

Q. The mechanics of your receiving that payment were what?

A. I would turn in an expense account report to the accounting department once a month. They would issue a check for it.

Q. Would they retain that voucher, that list of expenses?

A. I think that they would, yes. [89]

Q. That is you do not now have a retained copy of those things? A. No, I don't.

Q. Was there ever any expense voucher that you submitted to Puget Sound Pulp and Timber Company which was not paid in full by the defendant company?

A. No, there was not. Other than in a case where an error might be made in addition or possibly an item carried from one to the other—in very minor amounts—there never was any objection raised to any accounting for expenses that I submitted to the company.

The Court: Did you get any understanding from anything that was said or anything that was done by the employer as to why it was agreeable to your terminating your services?

Witness: Just in the conversation with Mr. Turcotte about this operation in California. He felt that I couldn't do justice to the paperboard division

(Testimony of Joe A. O'Reilly.)

at the same time as operating the mill in California.

The Court: Had you kept up that connection and that activity all the time that you had been connected with these two concerns here in Bellingham?

Witness: Yes.

The Court: You may proceed. [90]

Q. (By Mr. Short): Mr. O'Reilly, I am not sure how I asked you the last question. Let me now ask you this: Did any person at Puget Sound Pulp and Timber, whether he be officer, director, accountant, auditor, or anyone else, ever make any complaint to you or suggestion to you in reference to any expense accounts you submitted?

A. No person connected with Puget Sound Pulp and Timber Company, either officer or any other person, ever raised a question about the expense items I turned in. [91]

* * * * *

Q. In reference to the installation of this machine in Richmond, was there a company organized to operate that mill? A. Yes, there was.

Q. What was the name of that company?

A. California Paperboard Company.

The Court: Is that the one at Richmond with which you had been connected?

Witness: Yes, Your Honor.

Q. (By Mr. Short): Now, at the outset of your employment with the defendant company and Bellingham Paper Products Company, you referred to your Standard Carton Company in Tacoma.

(Testimony of Joe A. O'Reilly.)

A. Yes.

Q. Was that company in existence and operating during the period that you were also working for Bellingham Paper Products and Puget Sound Pulp and Timber? A. Yes, it was.

Q. Other than those two companies to which you now refer, was there any other company in which you had or acquired any interest during your employment by the defendants?

A. Yes, there was. In the early part of 1948 I was selling paperboard in Portland, Oregon, to the Columbia [92] Paper Box Company.

Q. Did you say "to" or "through"?

A. To the Columbia Paper Box Company from the paperboard division. I was selling board for Puget Sound to the Columbia, a customer of Puget Sound, and they evolved into financial difficulties so that later on they owed us an unpaid balance—by "us," I mean the paperboard division of Puget Sound—of about \$11,000.00, and I found from them that they were interested in selling their business. After negotiating with them for several months I personally purchased that company.

The Court: Beginning when?

Witness: I think it was in October, 1948.

A. (Continued) I operated it as my own personal business and also as a customer of Puget Sound through the balance of 1948 and to, I think, June 1st in 1949, at which time I sold it to California Container Corporation who operated it from

(Testimony of Joe A. O'Reilly.)

then on as—continuing as a customer of the Puget Sound paperboard division.

Q. When you acquired the—what is that name again? A. Columbia Paper Box Company.

Q. When you acquired that company, did you liquidate its indebtedness to the paperboard division of Puget Sound Pulp and Timber Company?

A. Yes, I did. [93]

Q. Did the representatives of the Puget Sound Pulp and Timber Company know of your acquisition of that company? A. Yes.

Q. Who knew, and by what means did he acquire his knowledge?

A. I told Mr. Roberg about it, and I believe that I mentioned it to Mr. Turcotte a couple of times.

Q. Before its acquisition?

A. During the time of negotiations, yes.

Q. Was your interest in any of the three companies you have mentioned ever the subject matter of any objection or dispute between yourself and any representative of Puget Sound Pulp and Timber Company?

A. No, with the exception of the last remarks which I mentioned.

Q. In reference to your opening the——

A. (Interposing) The California Paperboard Company in Richmond.

The Court: Is that the correct identity of the persons to whom you sold the Columbia Paper Box Company?

(Testimony of Joe A. O'Reilly.)

Witness: It is the California Container Corporation, a wholly owned subsidiary of the Container Corporation of America. [94]

The Court: Well, I want to know the identity of the purchaser of the Columbia Paper Box Company.

Witness: The California Container Corporation.

The Court: You may proceed.

Q. (By Mr. Short): Was any decrease in the sales volume of the paperboard division of Puget Sound Pulp and Timber occasioned by any of your activities in reference to either or any of these companies you just mentioned? A. No.

Q. In reference to the mill that you installed in Richmond with the machine that you have described from Ottawa, when did that mill commence production? A. Late in 1951.

Q. Approximately what month would you say?

A. I think November—partial production in November.

Q. And the erection of that mill commenced about what time?

A. Oh, the installation of the machinery began about May or June.

Q. Of what year? A. 1951. [95]

* * * * *

Cross Examination

Q. (By Mr. Evans): Mr. O'Reilly, from your testimony on the stand here, as I understand you became a one-quarter owner of what was the Bellingham Paper Products Company, is that right?

(Testimony of Joe A. O'Reilly.)

A. That is right.

Q. That company was organized with some 2,000 shares of stock, is that correct, and you had 500 of them?

A. I think that is right.

Q. Now, your contribution to that corporation consisted of this machine that you speak of which you valued at \$48,000.00, plus \$2,000.00 in cash, is that correct?

A. Yes. [104]

Q. So then you had \$50,000.00 worth of stock in the Bellingham Paper Products Corporation, is that correct?

A. Well, I wouldn't say that that would be a direct or correct comparison to the value of the stock because at the time the plans of the corporation were to borrow additional money, and for that the stock was pledged, so that as the thing developed, as time went on, the stock would increase in value because of the use of this borrowed money in connection with the operation.

Q. So far as par value of the stock was concerned, at the onset it would be \$50,000.00 worth of stock, is that a fair statement?

A. No, I don't think so.

Q. Well, in any event, \$50,000.00 was all you had in it at the start, is that correct?

A. That is correct.

Q. Now, as I understand, you also received some compensation for your services in helping get the plant in operation before you could actually make any sales, is that correct?

A. Yes, that is right, though during this period

(Testimony of Joe A. O'Reilly.)

there were some commitments for purchases which later resulted in sales.

Q. I see, but you received \$1800.00 as I recall, or some such sum, for your work in helping get the thing [105] organized so that it would produce a product which could be sold, is that not right?

A. If that is supported by the statement, I would say yes.

Q. Then you started drawing commissions, is that correct? A. Yes.

Q. And from then on you were paid on a commission basis? A. Yes.

Q. And that commission basis was three percent of the net sales after deducting freight, is that correct?

A. Yes, freight and any other discounts.

Q. I see, and that went along until the 15th of December, 1947, is that correct?

A. With the Bellingham Paper Products Company, yes. [106]

* * * * *

Q. Now, as I understand, at that time then the Bellingham Paper Products Company as a separate entity went out of business, and Puget Sound Pulp and Timber started running the same plant but as a division of its company, is that not correct?

A. Yes. The Puget Sound Pulp and Timber Company bought the Bellingham Paper Products Company and liquidated it and continued operating the property as the paperboard [108] division of the Puget Sound Pulp and Timber Company.

(Testimony of Joe A. O'Reilly.)

Q. And you went right along performing the same type of services and receiving three percent commission, is that not correct?

A. That is correct.

Q. Then I believe you told us some time in December of 1949 you voluntarily reduced your commission from three percent to one and one-half, is that correct?

A. I voluntarily suggested a temporary reduction of that amount at that time, yes.

Q. So that it was agreeable——

Mr. Short: (Interposing) Excuse me. What time did you state in your question?

Could I have that read?

The Court: It will be read.

* * * * *

Q. (By Mr. Evans): Mr. O'Reilly, I don't want to mislead you. I have the benefit of looking at some records here and you do not. That would have been in December 1948?

A. That is correct.

* * * * *

Q. (By Mr. Evans): On January 1, 1949, you were agreeable to receiving one and one-half percent commission—at least for that month—rather than three percent?

A. Yes.

Q. Now, it is a fact, is it not, that from January 1, 1949, on through your entire tenure with Puget Sound you continued to receive and did receive one and one-half percent commission?

A. I received the one and one-half percent commission through the balance of the time.

(Testimony of Joe A. O'Reilly.)

Q. Now, as I understand, you have no quarrel about not having received the one and one-half percent? A. No.

Q. In other words, if one and one-half percent was your proper rate, you were paid in full? [110]

* * * * *

A. I was paid the one and one-half percent.

Q. (By Mr. Evans): Now, your claim then here is that we should not have reduced your pay from three percent to one and one-half percent, is that correct? A. In effect, that is correct.

Q. I see. So you are now claiming that for all the period of time from January 1, 1949, through February 1952 you are entitled to an additional one and one-half percent? A. That is right.

Q. Now, you made no demand on anybody for this additional one and one-half percent—at least up until the time you terminated your employment—did you? A. Not a demand, no. [111]

Q. You only suggested it on one occasion?

A. One or two occasions.

Q. Well, now, do you recall your discovery deposition having been taken here March 5, 1954?

A. I do recall it.

Mr. Evans: In fairness to you, perhaps I should ask the bailiff if the discovery deposition might be handed to the witness.

Clerk: What page is that?

Mr. Evans: I will tell him the page. Just hand him the deposition, please.

(Testimony of Joe A. O'Reilly.)

(Whereupon a document is handed to the witness by the bailiff.)

Q. (By Mr. Evans): Will you turn to page 15, please, starting on line 11? I will ask you to pay close attention to the question and answer which I am going to read.

Is it not a fact that the following question was asked of you and the following answer made by you during your discovery deposition:

"Q. So that it is your recollection that the only conversation and the only understanding or agreement made was with Mr. Roberg?

"A. Mr. Roberg. I think that we talked about it. A matter of, oh, four to six months later I [112] suggested that it might be increased. I didn't suggest all the way at that time, as I recall it. Nothing was done about it."

Now, did you make that answer in response to the question I have just read? A. Yes, I did.

Q. Now, I call your attention to the next question and answer which I will read:

"Q. And was that conversation with Mr. Roberg?

"A. Yes."

Did that question and answer take place during your discovery deposition? A. Yes.

Q. Now, I will read the next question and answer:

"Q. And do you recall when and where that conversation took place?

(Testimony of Joe A. O'Reilly.)

"A. Well, it seems to me it was along about June of 1949."

Was that question and that answer made during your discovery deposition?

A. That is correct.

Q. And the next two questions and answers which are short and I will read them together:

"Q. About six months after this?

"A. I believe that is about right. [113]

"Q. And what did Mr. Roberg reply?

"A. Well, it wasn't a definite demand. It was more or less a casual conversation and he just,— it just passed by-the-board."

Were those your answers to the two questions I have just read? A. Yes.

Q. Now, as I understand, you tell us that you on two occasions, rather than once, made some suggestion that your pay should be increased to three percent?

A. My recollection of my answer was that I said once or twice.

Q. Well, we just read your question and answer, and it didn't say twice in there.

Mr. Short: No, no.

A. I said once or twice. It resolves itself to be once.

Q. So in fact it was only once that you mentioned it, is that right?

A. That is the way the deposition has it.

Q. Well, that is a fact, too, is it not?

A. To my recollection. [114]

(Testimony of Joe A. O'Reilly.)

Q. And you were under oath when you made your discovery deposition, and you are under oath now, is that not correct?

A. I may have talked to Mr. Roberg as many as six times about this. I am under oath to cite one at least but not all of the times.

Q. So your testimony is now that you only recall mentioning it to him that one time?

A. I don't know that that has to be a definite statement.

Q. Well, what is the fact? How many times did you suggest it and to whom?

A. I am sure of once, and possibly more, to Mr. Roberg.

Q. But you have no recollection of more than once? A. No definite recollection, no.

Q. And that was just casual conversation?

A. As they all were, yes.

Q. So you continued on in the employ of Puget Sound Pulp and Timber Company then at a rate of one and one-half percent from January 1, 1949, until your last [115] check in February 1952?

A. I continued on receiving commissions computed on the basis of one and one-half percent through that period.

Q. And you made no complaint about it?

A. Other than as we have discussed here.

Q. Now, as I understand, along in the latter part of 1950 you became interested in another paperboard mill down in California, is that not correct? A. That is incorrect. * * * * *

(Testimony of Joe A. O'Reilly.)

Q. Will you take a moment and look at A-7 so you can refresh your memory as to its contents?

A. (Peruses document.)

The only reason that I answered as I did is because this company in California didn't exist at that time. You said "interested in a concern in California." [116]

* * * * *

Q. (By Mr. Evans): Mr. O'Reilly, in Exhibit A-7, which is your letter to Mr. Turcotte dated November 24, 1950, you suggested to Mr. Turcotte, did you not, that he purchase some stock in the California Paperboard Company?

A. If and when it is a corporation, yes.

Q. Well, at that time, at the time you wrote that letter, November 24, 1950, you were sufficiently interested in what was later the California Paperboard Company to be soliciting prospective stockholders for money, were you not?

A. Well, in this particular case, the primary reason for the conversation was an allocation for pulp. The suggestion about stock was incidental.

Q. Well, what I am trying to determine is that you were devoting some of your efforts at least as early as November, 1950, towards promoting a paperboard company in California?

A. It was a proposal at that time.

Q. Well, you were devoting your efforts toward promoting a proposed company, is that correct?

A. A small portion of them. [117]

Q. And that company, it was proposed, would

(Testimony of Joe A. O'Reilly.)

be in competition with the paperboard division of Puget Sound Pulp and Timber Company, is that not a fact?

A. This letter discloses the intent. I can read the portions that are relevant if you like.

Q. Well, just answer my question. Is it not a fact that the paperboard company that you were proposing or working on in California would be in competition with Puget Sound?

A. The letter discloses that it was not to be in competition.

Q. Regardless of letters, is that a fact?

A. No. It is not a fact.

Q. They would be manufacturing the same products, would they not?

A. Not the same products, no.

Q. You are certain of that?

A. Yes. The reason I say that is this: That the primary raw materials for manufacturing paperboard in Bellingham are sulphite, pulp and screenings. This mill had no pulp connection whatever. It was a waste paper mill as differentiated from a mill forming paperboard from pulp materials.

The Court: Well, by that, do you wish the Court to understand that the raw materials used [118] at Richmond for manufacture of this paperboard were old waste paper that had been discarded in commerce?

Witness: Yes, such as at the present time the mill is operating strictly on old corrugated cases and kraft papers as raw material—maybe five per-

(Testimony of Joe A. O'Reilly.)

cent of bulk—whereas in the case of the paperboard division of Puget Sound——

The Court: (Interposing) Do both products find a place in the same market?

Witness: The primary purpose of your pulp board is for what they call food board and for food products; whereas the primary purpose of board from waste paper is like for soap cartons and corrugated boxes, things of that nature that are not in contact with food products.

The Court: You may proceed.

Q. (By Mr. Evans): Mr. O'Reilly, it is a fact, is it not, that a substantial portion of the raw materials for the paperboard division of Puget Sound Pulp and Timber is old waste newspapers, isn't that right?

A. I would say up to 40 percent as compared to 95 percent in Richmond.

Q. And is it not a fact that although the two mills [119] might not be making the same kind of product, the two products do compete with each other in the market?

A. You wouldn't use a food board to package soap.

Q. Can you answer my question? A. No.

Q. You can't answer my question?

The Court: I believe his answer was intended to be no.

A. The answer is no.

Q. Now, then, shortly thereafter, as I understand, you and Mr. Turcotte had a conversation

(Testimony of Joe A. O'Reilly.)

wherein he expressed the opinion that you could not successfully represent both this California mill and Puget Sound mill, is that not correct?

A. Yes.

Q. And you began to discuss a date upon which you would terminate your services with Puget Sound, is that not correct? A. Yes.

Q. Now, all this time you had been receiving one and one-half percent commission, ever since the first day of January, 1949, is that not correct?

A. That is correct—on the sales of products of the mill to customers that I developed.

Q. Well, it was on all sales, wasn't it? [120]

A. Yes.

Q. Now, as I understand from your direct testimony you had several conversations about what date you might terminate your services with Puget Sound, is that not correct?

A. That is correct.

Q. Now, you had a proposal of your own that you should be kept on there until December 31, 1952, is that not correct?

A. That is correct.

Q. And I believe Mr. Turcotte had a suggestion that your services should be terminated perhaps as early as July 1951, is that not correct?

A. I don't recall the exact date. I think it is covered in an exhibit.

Q. Well, at least on another occasion, is it not a fact that Mr. Turcotte suggested that your services be terminated on September 1, 1951?

(Testimony of Joe A. O'Reilly.)

A. Again I am not certain of the date.

Mr. Evans: Would you kindly hand to the witness Exhibit A-1, please? [121]

* * * * *

Q. (By Mr. Evans): Now, Mr. O'Reilly, I believe just before the recess you advised us that your California Paperboard Company would not be in competition with the paperboard division of the Puget Sound Pulp and Timber Company, is that what you so advised us? A. Yes.

Q. I believe you advised us that your company in California would be producing boxes for soap and things of that kind as distinguished from boxes for food items?

A. Producing no boxes in either case.

Q. Well, I mean the material for containers of that sort. A. That is correct.

Q. Now, is it not a fact, Mr. O'Reilly, that while you were here with Puget Sound Pulp and Timber Company that you produced several thousand tons of board for I believe making boxes of Tide Soap products? A. That is correct.

Q. Now, that is the same type of board or enters into the same competitive field as the company that you organized in California, is it not?

A. In that light, it would be. However, you may recall a statement I made—that there was a demand for [122] 100% more board than the paperboard division could produce in Bellingham. That is why I make the definite statement that the company wouldn't be in competition.

(Testimony of Joe A. O'Reilly.)

Q. I see. Then you are limiting your statement with regards to competition as to areas as distinguished from competing in the same products, is that correct?

A. There were some products that we couldn't compete in as I have outlined before, and there were some that we could. There are some areas that are desirable from a freight standpoint from one location of a mill and some from the other. That is the reason I made the statement that there would be no competition.

Q. Now, your California company started producing I believe you told us about mid 1951?

A. No. It was November I believe I said.

Q. 1951? A. Yes.

Q. And it took about ten months or so to install the machinery and build the mill?

A. The ten months previous to that.

Q. In other words, somewhere along about January 1, 1951, the California organization really began to come into being?

A. Work was being done down there, yes.

Q. And you were interested in that company at that [123] time? A. That is right.

Q. And you were spending a considerable amount of time down there supervising that work, is that right?

A. I had supervisors on the ground, including an engineer from Ottawa and a superintendent down there.

Q. Well, I am not concerned with what others

(Testimony of Joe A. O'Reilly.)

may have been doing, but you yourself were there supervising?

A. I was not superintending it, no.

Q. Well, you were there a good deal of the time?

A. I was there occasionally, yes.

Q. About how much of the time do you think you spent there?

A. Oh, I was probably in California in that area about a third of the time I guess.

Q. There is an exhibit I believe that was handed to you just before the recess, Exhibit A-1. Exhibit A-1 is your letter of July 12, 1951. Do you recall that letter? A. Yes, I do.

Q. Now, that is a letter you wrote to Mr. Turcotte with regard to your termination date with Puget Sound Pulp and Timber Company, is that not correct?

A. Among other things, that is one of the subject matters there.

Q. Now, I would like to call your attention to the [124] first three paragraphs of that letter. I will quote them:

"There are certain phases of the sales planning and operation of the board mill which I would like to bring to your attention.

"The sales program of this division has been handled in such a way that full production, and shipments of the most profitable grades to the closest customers, should continue throughout this and next year as now arranged.

"Customers, grades and areas have been selected

(Testimony of Joe A. O'Reilly.)

to avoid a competitive impact when new production, either by Container's new Los Angeles machine or California Paperboard in Richmond, comes into the field. This is the result of advance planning going back to last fall and winter."

Have I accurately quoted from the letter?

A. You have.

Q. Now, what do you mean that there has been some advance planning so as to avoid competitive impact when these two new companies come into the field, one of them being your own California Paperboard?

A. There was a backlog of demand for paperboard by the Gypsum, Lime & Alabastine Company which is covered in the next paragraph, and also the Pacific Match Company in Tacoma, and the Pacific Coast Paper Company in Bellingham, [125] which are more desirable customers than any in Southern or Central California for the paperboard division in Bellingham.

Q. In other words, am I correct in that you had been arranging with customers and dividing up the areas as you state in this letter so that when your California Paperboard Company came into operation its customers would be there ready for it in a given area, and Puget Sound would have another area that you had reserved for them, is that right?

A. No, it isn't. This planning was mostly due to the construction by Container Corporation of a mill in Los Angeles which was about to go into production then. The planning in this area of the

(Testimony of Joe A. O'Reilly.)

various products for the various customers took that into account, because the Los Angeles plant of the Container Corporation had been a major customer of the paperboard division.

Q. Well, tell me specifically what do you mean by the words:

“* * * grades, and areas have been selected to avoid a competitive impact when new production, either by Container's new Los Angeles machine or California Paperboard in Richmond, comes into the field.”

What do you mean by those words—“to avoid a competitive [126] impact”?

A. I meant to court the customers that are most desirable for the mill in this area, which we were doing—which I was doing—on behalf of Puget Sound at that time, primarily because of the construction of this mill in Los Angeles which would take away actually our major customer tonnage-wise. I felt that I had board placed in these different places that I have mentioned.

* * * * *

Q. (By Mr. Evans): Now, Mr. O'Reilly, in the last two paragraphs [127] on the first page of your letter you begin to make reference to a proposed date of termination, do you not? I will quote this, and you follow me, please:

“During this time it has been necessary for me to make promises, estimates and virtual commitments covering the balance of this year and thru next year. I have been telling everyone that I'll

(Testimony of Joe A. O'Reilly.)

continue to handle Puget Paperboard sales even after California Paperboard starts production.

"Your suggestion that I drop this as of October, or when California Paperboard starts producing, does not seem in the best interest of all concerned. As you want me to leave, and I have numerous customers who are looking to me for their needs thru next year, I believe December 31, 1952, would be the best separation date."

Have I quoted that correctly?

A. You have.

Q. Now, you are proposing I presume in that last paragraph that the separation date be December 31, 1952, is that the import which you were trying to put over? A. That is right.

Q. Now, on the second page, do I understand correctly here that you are setting forth the reasons why [128] you should have that long a period of time before your termination date? Particularly I call your attention to the fourth paragraph on page 2, which I will read:

"As you know I voluntarily reduced my sales commission from 3% to 1½" in January of 1950. This till now covers an 18 month period and the next 18 months on the same basis brings up the proposed termination date."

Have I read correctly what it says in the exhibit?

A. You have read correctly though there are two errors in that paragraph.

Q. Yes, that is what I want to come to next.

Now, there is one error in that it was actually

(Testimony of Joe A. O'Reilly.)

January 1, 1949, that you voluntarily cut your commission rather than January of 1950, is that right?

A. 1949 is the year referred to, yes.

Q. So that should be, instead of 18 months, 30 months in which you had been operating and receiving a one and one-half percent commission rather than the three percent, is that not correct?

A. Receiving a commission portion of one and one-half percent, yes.

Q. For 30 months rather than for 18 months?

A. That is correct.

Q. Now, was there some other error as to that paragraph, [129] not as I read it, but factual-wise?

A. Well, the commission, to quote a section of the first sentence—"from 3% to 1½" in January"; that is an error.

Q. And it should be a percent sign instead of an inches sign?

A. That is correct. [130]

* * * * *

Q. (By Mr. Evans): Now, actually you did arrive at an oral termination date with Mr. Turcotte of the last day of February, 1952, is that not correct?

A. That is correct.

Q. And there is no quarrel about that being the date that your services were terminated, is there?

A. No quarrel about that.

Q. Now, this oral conversation that you had with Mr. Turcotte during which you agree upon a termination date as of the last day of February, 1952, occurred after you wrote the letter of January 12, 1951, is that not correct?

(Testimony of Joe A. O'Reilly.)

A. The date on this letter is July 12, 1951.

Q. Excuse me. It occurred after that date?

A. It occurred after that date.

Q. Now, you left the vicinity of Bellingham some time shortly after Sept. 1, 1951, did you not?

A. Oh, I left Bellingham many times previous to that and also have returned many times since.

Q. Well, you actually cleaned out your desk and left the premises of Puget Sound physically at least some time shortly after the first of September, 1951, is that not a fact? [132]

A. Some time after the first of September 1951, that is correct.

Q. At least prior to the middle of September 1951, is that not correct?

A. I wouldn't say that, no.

Q. Well, at least prior to the first part of October 1951?

A. I believe that would probably be right.

Q. And you went down to California at that time, is that not correct? A. Yes.

Q. Now, your being in California, you were not available to get your commission checks by some one handing them to you, that is a fact, is it not?

A. Yes.

Q. So they were being mailed to you?

A. Yes.

Q. Now, you had a little delay in receiving some of your commission checks, did you not?

A. I believe there was one or so that was late.

* * * * * [133]

(Testimony of Joe A. O'Reilly.)

Q. (By Mr. Evans): Now, I would like for you to refer to Defendants' Exhibit A-2 which I believe is your letter of November 21, 1951, addressed to Mr. Turcotte, is that not correct?

A. Apparently it is, yes.

Q. I will read it and you watch the copy you have.

(Whereupon Mr. Evans read to the witness in its entirety Defendants' Exhibit A-2.)

Q. (By Mr. Evans): Have I read the letter accurately? A. Yes.

I was wondering why the lower portion of this letter has been removed—if I might ask that question. One-third of it has been torn off apparently.

Q. That is the letter that you sent I believe?

A. It is two-thirds of it.

Q. Now, was there any more of it? We can't find the rest of it. How it got torn off we can't tell. Can you enlighten us as to what was said, if anything, on the rest of it or was it just a blank sheet of paper?

A. I don't know. There might have been a post-script. That is the only reason I raise the question.

Q. Do you have your carbon copy of that letter?

A. I don't know whether I do or not. I haven't looked for it. [134]

Q. Well, that is the copy that was shown to you two days ago, was it not? A. This one?

Q. Yes. A. A photostat of this was.

Q. Now, in this letter of November 21, you make

(Testimony of Joe A. O'Reilly.)

no demand for anything in addition to one and one-half percent on your commissions, do you?

* * * * *

A. No, I do not.

Q. (By Mr. Evans): As a matter of fact you come right out and state:

"As I recall our agreement, a 11½% commission on boardmill sales would be paid me for six months, starting with the first of September."

A. That is what the letter states. [135]

* * * * *

Q. (By Mr. Evans): In other words, you knew that Mr. Turcotte was under the impression from his conversation with you that that was the only obligation he had to you, isn't that correct?

A. No.

Q. Well, then, why did you state in your letter:

"As I recall our agreement, a 11½" commission on boardmill sales would be paid me for [136] six months, * * * ."

A. That was the portion he had been paying me, and it was to continue for that period.

* * * * *

Q. (By Mr. Evans): Now, is the Exhibit A-3 that you have in your hand a letter of April 7, 1952 written by you to Mr. Turcotte?

A. Yes, it is.

Q. Now, that letter addressed to Mr. Turcotte states:

"Apparently your staff has overlooked sending

(Testimony of Joe A. O'Reilly.)

me the commission check for February, we had agreed that this would be the last one."

That is what it states, is it not?

A. That is what it states.

Q. Now, you meant what you said there, did you not?

A. I meant what I said there, but I didn't [137] imply that that would be the completion of the obligation of Puget Sound Pulp and Timber Company to me.

Q. Oh, I understand. The rest of your money you would receive in pulp wood or in cash rather than by check, is that what you mean?

A. I would take it in any way; I would prefer a check, however.

Q. Then, why did you state in this letter:

"* * * we had agreed that this would be the last one."

A. The last check at one and one-half percent, the portion of one and one-half percent. This would complete the period of time to the separation date that we had agreed on.

Q. Then you really didn't mean that this would be the last one? You just wrote this letter?

A. I meant this would be the last one, but I didn't mean it would be the last money that Puget Sound would give me.

Q. You made no demand for any additional moneys, had you?

A. Other than we have discussed.

(Testimony of Joe A. O'Reilly.)

Q. That was your conversation with Mr. Roberg in June or July of '49? A. Yes. [138]

Mr. Evans: Now, will you kindly hand the witness Exhibit A-4?

(Whereupon Defendants' Exhibit A-4 is handed to the witness by the bailiff.)

Q. (By Mr. Evans): It has been previously stipulated that that letter is a carbon copy of the one sent to you by Mr. Turcotte on April 8th. Do you have that letter in your hand?

A. I have the carbon copy of the letter.

Q. That letter states:

"Enclosed herewith is our check together with statement covering sales in the Board Division for the month of February. This completes our commitment to you as previously agreed upon.

"I hope everything is going well with your new venture, and remain,

"Yours sincerely,

"L. Turcotte"

Have I correctly read the letter?

A. You have. I don't consider the word "commitment" meaning obligation, however.

Mr. Evans: Kindly hand the witness Exhibit A-5.

(Whereupon Defendants' Exhibit A-5 is handed [139] to the witness by the bailiff.)

Q. (By Mr. Evans): You received Exhibit A-5 with the letter of April 8, did you not?

A. Yes.

(Testimony of Joe A. O'Reilly.)

Q. And you cashed that check thereafter and spent the money since?

A. Well, I probably spent the money but—at this time, I probably deposited it rather than cashed it.

Q. Well, now, you knew, did you not, Mr. O'Reilly, when you received the letter from Mr. Turcotte dated April 8, 1952, enclosing the check, stating:

“This completes our commitment to you as previously agreed upon.”

You knew that Mr. Turcotte understood this was the last money that was due you, is that correct?

A. No, I don't understand that.

Q. What do those words—“This completes our commitment to you as previously agreed upon.”—What do those words mean to you?

A. Commitment as to the period of time when commissions would be paid.

Q. I see, and you understood them so to mean?

A. What was that?

Q. You understood those words to mean that which [140] you have just told us? A. Yes.

Q. And I suppose the same as you understood in your previous letter of the day before which you had sent to Mr. Turcotte that this would be the last one that you knew he would understand that you really didn't mean it would be the last check, is that correct?

A. The last check for one and one-half percent.

(Testimony of Joe A. O'Reilly.)

Then, of course, I expected to get the other one and one-half percent for all this period of time.

Q. I see. Now, there was no more correspondence took place between you and Mr. Turcotte about this subject until about June of 1953, isn't that correct?

A. Without agreeing to that exact date, I would say it is about correct.

Mr. Evans: May I ask that the witness be handed Exhibit A-6, please?

The Court: That will be done.

(Whereupon Defendants' Exhibit A-6 is handed to the witness by the bailiff.)

Q. (By Mr. Evans): Now, your letter of June 5, 1953, which is Exhibit A-6 is one sent by you to Mr. Turcotte, is it not? A. Yes, it is.

Q. And is it not a fact that that is the first [141] demand that you ever made for anything over and above your one and one-half percent commission from January 1, 1949, on through?

A. It is the first formal demand.

Q. It is the first formal demand you made?

A. That is right.

Q. In other words, you let Puget Sound Pulp and Timber Company pay you at one and one-half percent from January 1, 1949, right on through your termination date thinking that that was all they owed you, and you first raised the question over a year after you leave their services?

Mr. Short: This is argumentative.

The Court: The objection is overruled.

(Testimony of Joe A. O'Reilly.)

Q. (By Mr. Evans): Isn't that correct?

A. Those times are correct, yes. [142]

* * * * *

Q. Mr. O'Reilly, isn't it a fact that you did not return to Bellingham after you left in September until after February 29, 1952? [143]

* * * * *

A. I have already said that it was not a fact.

Q. (By Mr. Evans): Now, in your operation of running this mill, you had to be in frequent contact with the superintendent, is that not correct, that is prior to the time of your separation?

A. Oh, I would say that our cycle of operation ran from twenty to thirty days, and I would be in contact with them usually at that time, at least that often.

Q. Well, isn't it a fact that you frequently only scheduled operations for about two or three days in advance?

A. No, that is not a fact. These were changes that were subject for a period of two or three days—depending on developments.

Q. In other words, it was essential that you know what kind of board they were producing in order to be able to know whether you could fill an order, isn't that correct?

A. The orders came first, the board production afterwards. We didn't make board for inventory; we made them to fill orders.

Q. Well, unless you were in touch with the mill and knew what their situation was, you could not

(Testimony of Joe A. O'Reilly.)

make a commitment that you could fill an order, could you?

A. Not very well. Naturally in this period [144] Mr. Turcotte had designated somebody else to gradually take over this programming work so it wasn't the same burden to me that it was before. That naturally follows. This obligation or service that I had done was gradually relinquished.

Q. So during the period from September through the last day of February, 1952, your services that you performed, if any, for Puget Sound were rather limited?

A. They were mostly connected with contacts with customers, answering questions that were put to me about various grades of board that it would be possible to make in Bellingham and what the characteristics were, things of that nature, yes.

Q. You weren't doing any selling because you weren't close enough to the mill to know whether they could produce the product you might want to sell, isn't that correct?

A. The sales being consummated were to customers that I had developed.

Q. But you were not actually making sales? You couldn't take an order, could you?

A. I actually was instrumental in getting orders to Bellingham as late as the middle of 1952, after I had left the service. I had a very friendly feeling for the paperboard division and did everything I could to aid [145] them in any way in connection with the customers.

(Testimony of Joe A. O'Reilly.)

Q. But you could not take an order after you left here, could you?

A. My orders were all subject to approval and acceptance and acknowledgment by the mill. I never during the whole period of time took an order as such myself.

The Court: It would be better if you answered the question directly.

A. Well, I would say no more so than I did before then.

Q. As a practical matter you didn't take an order—didn't have an order filled—from the time you left here in September of '51 through the period that you were actually paid?

A. The same condition existed as I outlined before. Some of those customers were on contract for a given number of tons per year, and I think that those were contracts that I was instrumental in having written, and I think they continued on through the full year of 1952 at least.

Q. Well, what do you mean by "instrumental in having written"? Do you mean that you suggested maybe they might buy it from Puget Sound, or something like that?

A. I had been selling them board on a certain basis for Puget Sound over a period of time, and I suggested that they would have a better position with the supplier [146] if they would enter into a contract for a given number of tons per year or per quarter or per month, as the case may be, which

(Testimony of Joe A. O'Reilly.)

would carry on. In other words, all of those contracts had what I term an evergreen clause.

Q. You never made any reports to Puget Sound or their officers about what you were doing, did you?

A. I never made any reports at any time.

Q. In other words, they were completely ignorant of what you were doing during this period of time, isn't that a fact?

A. As well as in the years previous, other than casual discussions from time to time.

Q. Well, in the years previous you were the manager, were you not, of the paperboard division?

A. Yes, but I wasn't making reports to anyone other than verbal conversations occasionally.

Q. You are quite certain that you were not making any written reports at any time as to the operations?

A. Not periodically, not in the way that you implied.

Q. Well, I don't care whether they are periodic or whenever they need to be made?

A. Well, I probably made two or three reports during the three or four year period.

Q. In fact, you committed to writing every time you thought it deserved the attention——?

A. No. I would have been writing continually if [147] I had done that.

* * * * *

Q. (By Mr. Evans): Mr. O'Reilly, you are being handed what has been marked for identification

(Testimony of Joe A. O'Reilly.)

as Defendants' Exhibit A-9. I wish you would kindly look at those if you have not already seen the photostatic copies I have given your counsel and advise me whether or not those are two reports that you submitted to Mr. Turcotte some time during the year 1951, perhaps the year before or the year after. Do you recognize them as such?

A. These are reports that I made, but not as reports of the operation of the mill. They are suggestions [148] for additions to the operation in both cases.

The Court: Do you know what year?

Witness: There is no year stated so it could be at any time during that three year period or even later.

Q. (By Mr. Evans): So those are types of reports that you did make from time to time when you considered it appropriate, is that correct?

A. These are apparently the only reports or you would have more I am sure.

Q. Those particular reports have been presented to you there, and I want to know if that is the type of report——

A. (Interposing) These are the reports.

Mr. Short: May I——

The Court: (Interposing) The question has been answered.

Mr. Evans: I offer Exhibit A-9.

Mr. Short: I will object to the offer upon the ground and for the reason that it is utterly immaterial.

(Testimony of Joe A. O'Reilly.)

I was about to interrupt counsel's progress in this line of questioning because he is completely misleading the witness and, therefore, the Court when [149] he purports to impeach the witness by these written reports when the question he was asked—that is, the witness was asked—was whether or not he made any reports to the company of his activities in selling customers and writing these alleged evergreen contracts, and in an attempt to both mislead the witness and anyone else present he produces reports not of selling but how the mill is physically functioning and the suggestions of this witness to improve the functioning, attempting by that process to contradict the witness when they perform no such purpose whatever, and the offer is strenuously objected to as being completely irrelevant and not purporting to impeach the witness in any particular.

Mr. Evens: I am sorry if I have misled counsel or the witness or the Court. I just happened to notice in my notes that I intended to at least make an offer of those two exhibits, and when I said "report," it reminded me I should have gotten them in. I had no intention of those being connected with the line of questioning I had just before, and I apologize if I have misled either counsel or the Court or the witness, because it was not my intention. [150]

The Court: What do you offer them for then?

Mr. Evans: For a type of report—to see whether this witness admits that they are reports he made.

(Testimony of Joe A. O'Reilly.)

By a later witness that I will call I will tie them in further, but for identification this is the only way I could do it was to present them to this witness.

The Court: Do you withhold the offer of them at this time?

Mr. Evans: I will offer them again later. I have gone through the motion of offering them at this time. I didn't know what counsel's attitude would be.

The Court: The Court will reserve ruling until further proof has been received.

Q. (By Mr. Evans): Now, Mr. O'Reilly, let's go back to the period from September 1951 through February 1952, as I understand you were sort of a roving ambassador contacting various peoples who had purchased or expected to purchase supplies from the Puget Sound Pulp and Timber Company, is that correct?

A. They were purchasing at the time.

Q. They were the same sort of people that you expected to do business with when you got the California Paperboard Company in operation, is that correct? [151]

A. No.

Q. Well, now, the advice you were giving them and the work you were doing is absolutely lost to Puget Sound unless someone in Puget Sound knows about what you are doing, isn't that correct?

A. I wouldn't say that.

Q. Then it is your understanding that you can go down and talk to the customers and make agreements with them, commitments, et cetera, and never

(Testimony of Joe A. O'Reilly.)

tell your employer a word about it, and that is going to be of some benefit to your employer?

A. You apparently aren't quite conversant with the procedure. I can see how you might arrive at that conclusion. These customers were buying board for specific purposes. I wasn't making commitments to them or committing Puget Sound to them. Various types of board are possible to be made on certain types of equipment. I have a very thorough knowledge of that.

A lot of the customers of Puget Sound still look to me for information about paperboard, not about specific orders or commitments of Puget Sound or orders that they imply they will place, general knowledge, the same as I have given them through all of this period of time.

Q. Well, as I correct in this much: That you at no [152] time reported to Puget Sound on anything that you had done after you left here in September of 1951?

A. I didn't report to them at that time or at any time previous. In most cases orders that I would discuss with the customer would be mailed directly to the mill rather than brought in by me, and that was the same procedure that followed through this period.

Q. Now, I would like to go back to the period just preceding that—from the time that you began to promote and become interested in the California Paperboard Company, is it not a fact that you were soliciting the customers of Puget Sound Pulp and

(Testimony of Joe A. O'Reilly.)

Timber Company for stock contributions in the new company you were organizing?

A. No. I offered opportunities to some of them in the area down there. I had already covered my plans about the distribution of territories, et cetera, in my information to Mr. Turcotte previously. Nothing I did was in violation of anything that I told him or any plans that I had outlined.

Q. In other words, as I understand, you did not solicit them to buy stock in your new company? You let them have some, is that right?

A. If some were interested, yes.

Q. One customer, as I recall, you let him have \$20,000.00 worth, Mr. Enmons, or some such name.

A. Well, "let him have" and "stocks" are two things that aren't exactly right. He never did own any stock in the California Paperboard Company.

Q. Well, he put up \$20,000.00 toward getting it in operation, didn't he?

A. Well, he let me have the use of the money but not for stock in the company.

Q. It was for the purpose of putting California Paperboard in business?

A. It wound up in that endeavor, yes.

* * * * *

Q. Now, as I understand, Mr. O'Reilly, during the time that you were connected with Puget Sound Pulp and Timber Company and its predecessor, Bellingham Paper Products Company, you received a total in commissions of something in excess of \$110,000.00, is that correct?

(Testimony of Joe A. O'Reilly.)

Mr. Short: Objected to as utterly immaterial if the Court please.

Mr. Evans: I believe I should be permitted to go into any claim on quantum meruit that might come out of this. If an employee suing on a contract can prove [154] and if his evidence shows an action on the point of quantum meruit, he can recover under it even though he has not pleaded.

Mr. Short: Nobody ever suggested the plaintiff in this action was suing on the claim of quantum meruit, and furthermore, there is in evidence this Exhibit 6 and those two that total every dime that this witness got, every dime from either company, and it went in without objection, and it is a part of the stipulation.

Now, the only purpose that counsel has by totaling a person's income over a series of years is to try to make a showing that because it is a six digit figure he ought not to be here suing for anything.

The Court: Is it already in evidence?

Mr. Short: It is.

The Court: Are the items already in evidence in detail?

Mr. Short: Yes.

The Court: The objection is overruled. He can ask him the total of it if he wishes. [155]

* * * * *

A. I think the figure is stated there, and I have no argument about the figure stated in that document.

Q. (By Mr. Evans): And in addition to that,

(Testimony of Joe A. O'Reilly.)

you received \$135,000.00 for your \$50,000 capital investment?

Mr. Short: Same objection if the Court please.

The Court: Overruled.

A. If the figures are stated there, I don't disagree with them.

Q. Making a total of something slightly under \$200,000.00 net to you during this less than six years [156] you were with these companies?

Mr. Short: May I have a running objection to this type of question?

The Court: Yes, you may, and it is overruled.

A. I think those figures are correct; if that is the total, I will agree with them.

Q. Well, then, as I understand from your counsel's objection, you have no complaint that you were underpaid for the work that you did, is that correct?

A. Yes, I do have a complaint or this action would not be in operation here. * * * * *

Q. Now, in addition to this work that you were doing for Puget Sound, you were also running another box company as I understand it down in Portland?

A. I did for a period of time, as I stated.

Q. And in addition to that you were running some sort of a paperboard company in Tacoma?

A. In the start, that was the case. It wasn't a paperboard company. It was the Standard Carton Company which did own and operate a paperboard mill.

(Testimony of Joe A. O'Reilly.)

Q. So in reality, at various periods of time during this six years you were literally the manager and operator [157] of three different companies?

A. That is right.

Q. And you received an income for your services in all three of them, isn't that right?

Mr. Short: Objected to as utterly immaterial.

The Court: Overruled.

A. Yes. * * * * *

Q. (By Mr. Evans): Mr. O'Reilly, calling your attention back to the time when you went in Mr. Roberg's office and voluntarily reduced your commissions from three percent to one and one-half percent, as I recall you advised us that the company wasn't doing very well at that time, is that correct?

A. Not as well as it could have been doing, that is correct.

Q. And you were well aware that the Board of Directors of not only Bellingham Paper Products Company but also of Puget Sound knew the company wasn't doing well, too, isn't that a fact?

A. They were aware of that fact. [158]

Q. And it was a matter of some concern of everybody that had anything to do with the operation of those two companies, isn't that a fact?

A. It was of some concern.

Q. As a practical matter, it was even thought by some and perhaps even by you that it might be necessary to close that paperboard mill down, isn't that correct?

A. No, it is not.

Q. It isn't?

A. It is not.

(Testimony of Joe A. O'Reilly.)

Q. But in any event the situation was bad enough that you were willing to voluntarily reduce your commissions?

A. Well, I made the suggestion of taking a lesser amount for a period.

Q. A period that you did not stipulate?

A. That is right.

Q. Now, something that I am a little confused about—As I understand, you went back to Ottawa and bought another paperboard machine?

A. Yes.

Q. And you bought it on your own, is that correct?

A. Eventually, yes. I discussed the paperboard machine with Mr. Roberg and Mr. Turcotte before doing that.

Q. But nobody from Puget Sound authorized you to go back there and buy a paperboard machine for them, did [159] they? A. No.

Q. It looked like such a good buy to you that you just couldn't leave it alone or something to that effect, isn't that right?

A. Something to that effect is correct, yes.

Q. Now you recall when you went back?

A. I don't actually.

Q. Well, would it have been prior to the time when you proposed to Mr. Turcotte in your letter I believe of November 24, 1950, that he invest some money in the California paper company?

A. It would have been prior to that, yes.

(Testimony of Joe A. O'Reilly.)

Q. So you had gone back there and you already had the machine?

A. I didn't buy the machine when I was back there.

Q. You just went back to look at it and were negotiating, is that right?

A. Negotiated and talked about it, either.

Q. So the fact that Puget Sound did not install that machine after you had purchased it was not a shock to you, was it? In other words, you already knew they weren't going to put it in, didn't you?

A. No, I did not. It wasn't exactly a shock because it developed gradually. I felt quite confident they would [160] put it in because they had a mill building provided to accommodate it, and it would have made a considerable amount of money for them if they had put it in.

Q. Well, as a practical matter, the present board mill takes care of all the materials they can produce any how?

A. No, that isn't so. Actually at this time a new type of board was being sold on the market called bleached kraft which came into very popular use, and at this time Puget Sound was also bleaching their sulphite. It would have been possible to run all the tonnage over that new machine that could be produced on it and sold in the field that this new board is supplying. It wouldn't have been quite as strong as the kraft, but in most cases it would be suitable for the job.

Since that time, the Potlatch Industries in Lew-

(Testimony of Joe A. O'Reilly.)

iston, Idaho, have added a second machine which would have about three times the capacity of this proposed machine. Weyerhaeuser Timber Company has installed a machine for the same purpose, which is producing about three times as much as this proposed machine would have done.

We could have moved right out and run bleached sulphite over that machine and sold it at the price established by Potlatch Industries, which was \$185.00 for board in rolls and \$200.00 for board in sheets, as compared as [161] I recall it with \$135.00 to \$140.00 for the pulp, which would have given a good profit for the conversion of the pulp into board and a ready market for the product.

Q. But in any event the officers of Puget Sound did not elect and indicated to you they did not wish to invest in another machine, isn't that correct?

A. That is right.

Q. And it was their prerogative, was it not, to make that decision?

A. They certainly did have that right.

Q. So then your complaint is rather a criticism of their judgment rather than any wrong they have done you, isn't that correct?

A. Well, after living with an operation for three years and assuming that you are going to have a second machine in that mill, it was a considerable disappointment. I wouldn't say it was a wrong done me, but it makes the whole operation look much worse than if the machine had been installed and put into operation.

(Testimony of Joe A. O'Reilly.)

The machine is now making a profit of at least \$30.00 a ton on the board it produces. The profit would have been greater in Bellingham.

Q. What it amounts to then is that you were disappointed that your employer refused to expand his plant?

A. I was disappointed that my employer changed [162] his mind about his dedicated intention when the mill was built,—when a good opportunity to do that presented itself.

Mr. Evans: No further questions.

The Court: Any further questions? Did you wish to ask of the witness any questions on redirect?

Mr. Short: Yes, Your Honor.

Redirect Examination

Q. (By Mr. Short): Mr. O'Reilly, just prior to your signing Exhibit 1 of May 22, 1946, with the Puget Sound Pulp and Timber Company, I believe you testified you were then self-employed with the Standard Carton Company in Tacoma, is that correct? A. Yes.

Q. What was your average annual income from that business just prior to going with Puget Sound Pulp and Timber Company?

Mr. Evans: Object to as to materiality.

The Court: The objection is overruled.

A. In years previous to and including 1950 I had made as much as \$40,000.00. At the time of leaving Tacoma, as I recall it, we were making

(Testimony of Joe A. O'Reilly.)

\$14,000.00 a month at the [163] Standard Carton Company.

Q. And you went into this venture with the Puget Sound Pulp and Timber Company and its subsidiary, the Bellingham Paper Products Company, in anticipation of having a two machine operation at the Bellingham Paper Products Company?

Mr. Evans: Objected to as being leading.

The Court: Sustained.

Q. (By Mr. Short): How many machines did you anticipate that the Bellingham Paper Products plant would have in it?

Mr. Evans: Objected to as not being material, Your Honor, as to what he might have anticipated. What was agreed to, or something like that, is a different problem.

The Court: Would you not have to show some connection of the other party to the arrangement in the employment?

Mr. Short: Well, the connection is a little bit obvious. They built a two story building to operate two machines in it. This man sacrificed his then business to go into a venture to produce a certain sales volume, three percent of which would constitute his income.

The Court: He can state what they said on [164] that subject, if you think they said anything, but the objection is sustained.

Q. (By Mr. Short): What was said at the outset by a member of the Puget Sound Pulp and

(Testimony of Joe A. O'Reilly.)

Timber Company as to the anticipated number of machines to be used in this operation?

A. My original suggestion was for a one machine mill and a smaller building, but as it developed the Puget Sound people decided on a two machine building which would eventually house two machines, and to put this one machine into it; so naturally that was the dedicated ambition or intention.

The Court: The Court does not regard the answer as responsive. I thought you were going to ask him what was said by his employers or some one speaking for them. Wasn't that what you intended?

Mr. Short: Yes.

A. (Continued) Well, I said: "Let's build a one machine board mill," and I think Mr. Roberg said, after discussing it with his engineering department and various others, that the mill building should be erected for two machines, the second one to be added later, which would naturally increase very greatly the cost and overhead of the operation of one machine in that setting and, also, [165] would indicate a definite plan to install a second machine to bear that burden of overhead.

Q. When you first began negotiations with the Puget Sound Pulp and Timber Company, was it for the construction of a building for yourself with one machine or for Puget Sound Pulp and Timber Company? A. It was for myself.

(Testimony of Joe A. O'Reilly.)

Q. And was that to be operated as part of the Standard Carton Company?

A. I don't believe that it was contemplated that way. It could or could not have been.

Q. But it would be owned by you whatever name you employed? A. That is right.

* * * * * [166]

Q. (By Mr. Short): Mr. O'Reilly, when those negotiations became [167] converted into the suggestion that a board mill be erected by Puget Sound Pulp and Timber Company, what was then discussed as to how many machines would be then operated in that building?

A. The various merits of one and two machine mills were discussed, and it was decided that two machines would be eventually put in operation in the paperboard mill building.

Q. And was the building designed for purposes of accommodating two machines?

A. Yes, it was.

Q. Would you briefly describe the size—well, the machine that actually went into the building, the paperboard machine that you got at Watertown, what was the size? How much room does such a machine occupy?

A. Well, a paperboard machine is quite a large unit. That machine would require about twenty railroad cars to transport it out here, and when erected on the floor it would have a length of about 180 feet. Approximate width, including the gears and drives on the back, would be 15 feet on the floor.

(Testimony of Joe A. O'Reilly.)

An elevation of 16 to 18 feet through the dryer section.

Q. And does that accommodate a continuous process from one end to the other?

A. Yes, it does. [168]

The cylinder molds have a face of 74", and the dryers, 6' or about 72" wide. As the shrinkage occurs during drying, the final width of the sheet produced is 66".

Q. And the tonnage capacity of that machine that was actually installed is approximately what?

A. The tonnage capacity of a paperboard machine is usually rated at one ton per inch, so, operating at 100% efficiency, it would be 66 tons in 24 hours. The operations start out on a basis of maybe 50% of that and probably have attained 80% of efficiency at the present time.

Q. There was some testimony on your cross examination in reference to your disappointment in the failure of Puget Sound to establish a second machine. I will ask you, had the second machine been installed, what result would that have caused to your compensation?

A. Well, it should have at least tripled the compensation because the capacity of the second machine was estimated at virtually double that of the first. In other words, a 100" to 120" machine was contemplated, which would produce about twice as much tonnage, and inasmuch as the small machine was bearing all the burden of overhead for this large building as well as its own installation and

(Testimony of Joe A. O'Reilly.)

operation and supervisory crews, the second two-thirds of the volume would produce a greater profit than the first one-third. [169]

Q. Also, in those preliminary discussions in reference to the general plan to be followed, what was discussed in reference to your rate of commission?

A. I originally asked five percent sales commission because that was the amount that the pulp company was paying for their, oh, approximately \$20,000,000.00 a year of sales in pulp, or I would say, rather, a major portion of it.

Q. Were those commissions paid on the Pacific Coast or not?

Mr. Evans: I am going to object to this line of inquiry. I don't think it is material as to what——

Mr. Short: (Interposing) I will abandon that subject.

Mr. Evans: (Continued) ——what Puget Sound is paying some one else for some other job.

The Court: I understand counsel withdraws it and will pursue some other line of inquiry.

Mr. Short: Yes.

Q. (By Mr. Short): In reference to your testimony on cross examination in reference to the fact that certain customers had been developed by you, were there any customers of Puget Sound Pulp and Timber paperboard division or customers of its predecessor, Bellingham Paper Products Company, in [170] say 1950 and '51 who were not developed by you?

A. No, there were not. There were some—we

(Testimony of Joe A. O'Reilly.)

might say some drop-in sales came through association, but the percentage would be very small, like maybe three percent of the total.

Q. You also mentioned in your examination a term which I would appreciate your explaining. You referred to what you called an evergreen contract. What does that mean in the trade?

A. In the paperboard trade it means a contract which is self-renewing unless it is canceled by notice at some time previous to the date of expiration. In other words, the buyer has to anticipate his desire to cancel that by notice before the completion, and in case he doesn't, the contract remains in effect.

Q. Well, under those contracts does the customer order a certain minimum tonnage per period?

A. It is based on a minimum tonnage either by the month, by the quarter or by the year though he can buy more than that if his needs indicate it and the tonnage is available.

Q. No price is stated in those?

A. No price is stated.

Q. During any period that you were in the employ of Puget Sound Pulp and Timber Company and Bellingham Paper [171] Products Company, were you in the process of actively soliciting customers or what was the condition of the market as to whether the customers were soliciting the board mill or whether the board mill was soliciting the customers?

A. Well, the trend of business changed several times. There were some times when customers were

(Testimony of Joe A. O'Reilly.)

clamoring for board; there were some times when we had to seek and find the customers. I would say that my efforts were divided between servicing and soliciting customers.

Q. Do you recall your being asked by Mr. Evans whether or not during the period of September or October 1951 to February 1952 you brought in any orders from customers during that period to Puget Sound Pulp and Timber Company? Do you recall that question and answer?

A. Not exactly.

Q. Well, let me ask you. Prior to the period of October '51 to February of '52, inclusive, did you bring into the company orders for the sale of paper-board to Puget Sound Pulp and Timber Company?

A. The orders were practically all mailed direct.
* * * * * [172]

Q. (By Mr. Short): What mechanical procedure was followed in orders and in filling those orders?

A. Orders would develop as a result of personal calls and conversations by me, sometimes direct in person, sometimes by telephone. There were a small percentage of orders that I would actually bring back with me, which is what I referred to when I said yes, but the major orders would be developed as the customers' requirements also developed and would be mailed into the company at that time.

The Court: Well, would that last classification [173] of instances be an acquirement of yours per-

(Testimony of Joe A. O'Reilly.)

sonally or would it be something else? I do not understand what you mean.

Witness: Well, I was under the impression that the question was whether or not I physically brought back the orders personally to the company, and that I didn't do, only in a small percentage of cases.

The Court: All right. You may proceed.

Q. (By Mr. Short): Now, as I understand it, what you just described was the procedure prior to October 1951. What was the procedure subsequent to October '51 until February 29, 1952? Was there any change in that method?

A. There was no change in the method. The market at that time was in a case where demand was greater than supply, and my activities were in the nature of servicing the customers rather than soliciting orders.

Q. When you refer to servicing customers, to what do you have reference?

A. I mean answering their questions in regard to types and purposes of board, what can be accomplished by certain types of board, whether or not it could be treated for wet strength or grease-proofed.

Q. Did you say "grease-proofed"? [174]

A. Grease-proofed, yes, moisture proof, or bending qualities, or what we call a mullen test, which is the inherent strength of the board to rupturing, various and sundry things that have to do with

(Testimony of Joe A. O'Reilly.)

using board for a proposed purpose, which invariably the customers would ask me.

Q. Was there any other person at Puget Sound Pulp and Timber Company who had the background qualifications to answer that type of inquiry you have just described from their customers?

A. No, there wasn't though the laboratory had developed a lot of knowledge about physical characteristics of board. However, they didn't have the background of knowing what the various grades of board had been used for in times past and what could be expected of it in the future.

Q. Geographically, what area of the United States did your efforts concern themselves with?

A. In the final operation, the efforts were confined to the Pacific Coast, Southern California, Central California, Oregon and Washington. Previous to that, we had customers in the Middle West and on the East Coast, such as Philadelphia.

Q. That is paperboard customers?

A. That is right.

Q. Now, during the period of your employment prior [175] to October 1951, can you describe to the Court what proportion of your time did you physically spend in the plant at Bellingham and what proportion of your time did you spend elsewhere?

A. Well, I would say through the years that I would have spent——

The Court: Did you spend? That is the question. How much did you spend?

(Testimony of Joe A. O'Reilly.)

A. Did spend? One-third to one-half of my time in Bellingham.

Q. (By Mr. Short): And the remaining one-half or two-thirds would be spent where?

A. In other cities in Washington and Portland, Oregon, and Central and Southern California.

Q. Describe, if you will, what your activities consisted of while you were away from the plant of the Bellingham Paper Products Company?

A. I would call on the customers in various areas as well as prospects for paperboard from the mill. I would be in touch with the mill by telephone at intervals.

Q. Well, is there any particular area in which more customers are located than in another?

A. Well, I think finally it was divided about 50% between the Northwest, including Canada, or possibly 60% [176] as compared to 40% in Central and Southern California.

Q. Directing your attention now to the period of September and October 1951 until February 29, 1952, were your activities in reference to the Puget Sound Pulp and Timber Company accounts any different during that period than during the previous period you have just described?

A. The activities were no different than they were in previous times when board was in demand. During this time I had been in the Northwest several different times and called on, oh, I would say I called on Eagle Paper Box Company in Tacoma, the Northwestern Paper Box Company in Seattle,

(Testimony of Joe A. O'Reilly.)

the California Container Corporation in Portland, Oregon, as well as many accounts in the Bay Area and Los Angeles.

Q. During the period you have just described of September or October 1951 until February 29, 1952, what was the then state of the market as to supply and demand?

A. The customers were clamoring for more board than could be supplied.

Q. During the period of time just referred to, state whether or not the board mill during that period of time was operating at capacity?

A. The board mill was operating at full capacity through all of these times, and I think that February was probably one of the biggest months in volume that they [177] had.

Q. February of what year?

A. Of 1952.

Q. Was it necessary for you to then during that period of time actively sell the product of the paper-board division? A. No, it was not.

Q. Ordinarily when you would make these trips to Seattle, Tacoma, the Bay Area and Southern California, on any given trip how long would you ordinarily be gone? What was the normal length of time those trips away from the Bellingham plant would take?

A. Usually they would take two weeks or longer, a major portion of a week around the Bay Area and about the same time down South, and possibly two

(Testimony of Joe A. O'Reilly.)

or three days in Portland, and two or three days in the Seattle and Tacoma area.

Q. Was there ever any occasion during the period preceding October 1951 in which an incident occurred as you just recently described of coming North to the Seattle-Portland-Tacoma area and then returning South again without coming to Bellingham?

A. Yes, there were several occasions. It would depend on circumstances at the time.

The Court: State for my convenience, [178] even though you may have, from your standpoint, sufficiently discussed it already, what, if any, change occurred in the nature and extent of your services to the defendants after the change of the percentage rate of compensation from three to one and one-half percent.

Witness: No change whatever.

The Court: Well, the same question with reference to the defendants' acts and conduct.

Witness: There was no change.

The Court: Do you recall the defendants doing anything different after that time when you announced your willingness to receive one and one-half percent of the profit or whatever it was, one and one-half percent of whatever it was you were to get, instead of three percent?

Witness: As a matter of accounting, they changed the method of charging pulp to the board mill, which made no difference to me personally profit-wise or to the stockholders of the company.

(Testimony of Joe A. O'Reilly.)

In other words, it was of no value to any one; it was just an accounting procedure.

The Court: Was it of any value to the stockholders?

Witness: No value. [179]

The Court: Or other officers or employees of the defendant company?

Witness: No value to any one. It was just a different method of accounting.

The Court: Did it have any effect whatsoever on building up any greater reserve or any stock in trade or the increasing of the capital plant establishment or anything of that sort?

Witness: None whatever. * * * * *

Q. You were asked on your cross examination in reference to a man named Mr. Emmons. Will you identify him, please, this gentleman from California?

A. He is the manager of the Salinas Valley Wax Paper Company in Salinas Valley, California.

Q. I am confused about this. Is he the man to whom reference was made as having advanced some money to you for your use in establishing the mill in Richmond? Is that the same person?

A. That is the same person.

Q. How long had you known Mr. Emmons at that time?

A. He had been a personal friend of mine for in excess of ten years I would say. * * * * * [180]

Q. (By Mr. Short): Mr. O'Reilly, does that

(Testimony of Joe A. O'Reilly.)

Exhibit A-6 which I have just read fully state your views and contentions? A. Yes, it does.

The Court: Had you discussed the matter with counsel before writing that letter?

Witness: No.

The Court: That was just something you decided to write without advice from counsel or anyone else?

Witness: That is correct.

The Court: Since on or about the time you began receiving the one and one-half percent [181] instead of the former three percent, did you or have you discussed the matter of your rights under your contract with respect to this business with any member of the Bar?

Witness: No, I did not. As a matter of fact, I brought the letter personally to Bellingham and expected to talk to Mr. Turcotte about it, about the various things that were put forth there. He was absent from the city at the time so I left it in the office for him.

The Court: You may inquire.

Mr. Short: That is all, Your Honor.

The Court: Any recross?

Recross Examination

Q. (By Mr. Evans): Mr. O'Reilly, you understand that the Court meant when he asked you if you had discussed this matter with counsel prior to writing your letter of June 5, 1953—do you understand what that meant?

(Testimony of Joe A. O'Reilly.)

A. I very definitely do.

Q. Just to make sure——

A. I very definitely do. I discussed it with no attorney of any kind previous to bringing that letter. [182] In fact, it was after receiving Mr. Turcotte's reply in which he did not deign to discuss the matter personally, several months after that I took it up with attorneys.

Q. Now, you were given a rather free hand with the operation of the board mill, were you not?

A. Yes, I was.

Q. As a matter of fact, when you came in there you were the only expert on how to manufacture paperboard, were you not?

A. Well, I wouldn't classify myself as an expert, but I was cognizant of the methods and usual products.

Q. Well, anything that was done there was done under your direction, isn't that correct, so far as operation is concerned, what they made and how they made it? A. That is correct.

Q. And no one told you how to do your job, did they?

A. Not directly. We discussed the position from time to time. I talked to Mr. Roberg mostly, occasionally both Mr. Roberg and Mr. Turcotte.

Q. The decisions that were made, particularly as to the technical side of the matter, as to what should be made and how it should be made, were your decisions, were they not? A. Yes. [183]

Q. In other words, they didn't try to interfere

(Testimony of Joe A. O'Reilly.)

and tell you to do something different from that which you thought was the right thing to do, did they?

A. There were a few suggestions from time to time but they didn't give me any definite directives.

Q. So now in this letter of June 5, when you speak of certain things that caused casualties, I believe you called them, as to sales, those were in reality results of your decisions and your activities.

A. Not at all. They were the results of business conditions in general and outside competition.

Q. Well, now, does that account for the dirt count in the paper? A. No.

Q. In other words, these physical things that caused you to lose orders or quit making different kinds of paperboard were as a result of your own efforts in managing the paperboard division, isn't that correct? A. No.

Q. Well, then, what was the cause of the extra dirt count, et cetera?

A. The dirt count was in the pulp which is our raw material, and which we could not avoid carrying through to our finished product. When pulp is in great demand, screenings are done in a more efficient manner, which means [184] that all of the fibers possible are removed from the knots and chivs and imperfections in the board, with the result that a certain amount of dirt goes through into the pulp, making it lower grade.

By the same token, it removes all of the fibers

(Testimony of Joe A. O'Reilly.)

virtually from the screenings, and they also are lower grade.

When we were in competition on tag board, the most outstanding producer of tag board in the country was Springhill, Louisiana, and they had a perfectly cream-colored sheet of tag board that was really beautiful to look at, but it wasn't available, so we offered our tag board though we had a dirt count in it to the customers in need of it. However, when Springhill tag and other qualities like that became available, we weren't able to sell our tag board.

Q. But it was no fault of the Puget Sound Pulp mill?

A. It was the result of their efforts to produce greater earnings in the pulp mill, yes. It wasn't a definite action towards me.

Q. Now, just let me finish my question.

It was through nothing they did on their part that caused you to lose these customers, was it?

A. No. [185]

Q. Now, I understand a great deal of your testimony this morning with regards to the work that you did for Puget Sound Pulp and Timber Company after you left some time in September up until the time that your checks stopped, as of the last day of February, '52, how would Puget Sound Company know whether you were doing any work or not?

* * * * *

A. The executive officers of the company would

(Testimony of Joe A. O'Reilly.)

have no way of knowing. There would be certain contacts with the board mill but inquiries were never made in that connection at any time.

Q. So then Puget Sound would have no way of knowing whether you had done any work whatever or had spent all your time, is that right?

A. Not without exploring it specifically, there would be no way that it would come to their attention, no more during this period than any time previously. [186]

Q. Well, prior to this period of time you had an office there; you were around every now and then; you had conversations with Mr. Turcotte and Mr. Roberg about how things were going on, didn't you?

A. That is right.

Q. But after some time in September '51 you never saw them again, did you?

A. Either of the two gentlemen mentioned?

Q. Yes. A. I don't believe so.

Q. And they are the officers or the managers who run the company, isn't that right?

A. That is right.

Q. Now, during this period of time you were also pushing your products, selling the products of your new paperboard company in California, were you not? [187]

* * * * *

A. The paperboard mill was running at full capacity all this time and——

Mr. Short: What paperboard mill?

Witness: The paperboard mill in Bellingham

(Testimony of Joe A. O'Reilly.)

was running at full capacity and customers were asking for more tonnage. I talked to them about this additional tonnage being supplied from down below in certain cases where the area was more desirable for that production and less desirable for the mill up here.

Q. (By Mr. Evans): But you were during this period of time procuring customers and taking orders for this new California company, were you not? A. Yes.

Q. And you wanted that mill to be in full capacity, too, did you not?

A. I had already suggested to Mr. Turcotte that I felt capable of keeping them both going to full capacity.

Q. Well, will you kindly answer my question, please?

Mr. Evans: Will the reporter read it, please?

(Whereupon the question is read by the court reporter as follows: "And you wanted that mill to be in full capacity, too, did you not?") [188]

A. Yes.

Q. Now, I believe you also advised us on redirect examination here this morning that there was no problem to sell the products of paperboard mills; that customers were just clamoring for the products during this period of time, is that correct?

A. That is correct.

Q. So, as a practical matter, there were no services of a salesman needed, is that what you are trying to tell us?

(Testimony of Joe A. O'Reilly.)

A. The service to a customer and user of paperboard is always a requirement regardless, because of the characteristics and natures of the products and capabilities of certain mills and equipment to produce them. That never diminishes.

Q. Now, during this period of time, September through February, 1952, you spent the major portion of your time, as I understand it, in California, is that correct? A. That is correct.

Q. On how many occasions, if any, did you actually make a trip up to the State of Washington?

* * * * *

A. I made at least six or eight trips during that period to the State of Washington.

Q. (By Mr. Evans): That is during that six months period?

A. That is right. Well, let's see, that is a five month period, isn't it?

* * * * *

Q. Now, most of the customers of Puget Sound Pulp and Timber Company are in Washington, Oregon and Canada, isn't that correct?

A. Numerically or volume-wise? [190]

Q. Well, any way you want to put it.

A. In the planning for this arrangement, I planned to have practically all of them in Oregon, Washington and Canada.

Q. That was so they couldn't compete with your California company, isn't that correct?

A. So the paperboard division would realize a

(Testimony of Joe A. O'Reilly.)

greater profit because of lack of freight expenses in shipping to greater distances.

Q. You arranged it that way?

A. That is right.

Q. But that is where most of their customers were?

A. Not "were." That is where they may be now, but not were.

Q. Well, if you had arranged it that way—you left them at about that time—then the fact that they may be there now was not due to anything that you did, was it?

Mr. Short: I don't quite understand the question.

The Court: Read the question.

(Whereupon the last question is read by the court reporter.)

A. Yes, it was. The reason I say that is for instance in the case of Gypsum, Lime & Alabastine Company they were asking for 450 tons a month, which is about 40% [191] of the capacity of the board mill here and at that time we could only give them about 250 tons a month. The customers were asking for more board in every area, but in going along with their demands and planning to place the board where it would be more profitable for the paperboard mill here is why it resulted in that way.

I would say even today that it is probably divided 60-40 as far as numerical customers are concerned between the other states and Washington and Canada.

(Testimony of Joe A. O'Reilly.)

Q. Now, do I understand you correctly that you did not carry an order book around with you and actually procure a signature of a customer on orders?

A. That is correct. In fact, we didn't have an order book.

Q. You didn't even have an order book?

A. There is none in the Puget Sound Company today.

Q. Well, then, it was up to the customer to write a letter or send a purchase order, whatever he wanted to the company, by mail to obtain his products that he might want, is that right?

A. That is right.

Q. And this servicing of customers, as you call it, that doesn't include taking any orders then as I understand it. It is just going around and being somewhat of a good will ambassador answering any questions they might have? [192]

A. I would say more than their technical questions. It is the matter of promoting the good will of a customer toward the company, naturally.

Q. Well, you take them to lunch and are nice to them; you pass the time of day with them; you answer any technical questions they want answered; just build good will, is that right?

A. That is right.

Q. So that is what you contend your job was during the period from September of '51 through February of '52?

A. In that regard it continued as before, yes.

(Testimony of Joe A. O'Reilly.)

Q. Now, you didn't submit any expense accounts during that period of time, did you?

A. No, I didn't.

* * * * * [193]

THOMAS GUY EMMONS

called as a witness on behalf of the plaintiff, being first duly sworn by the Notary, testified as follows:

Mr. Short: (Reading)

"By Mr. Bernbaum:

"Q. Mr. Emmons, please state your full name.

"A. Thomas Guy Emmons.

"Q. You are associated with the Salinas Valley Wax Paper Company? "A. Yes, sir.

"Q. In what capacity? "A. Part owner.

"Q. And in your capacity as part owner, you handle the purchases for the company, for its supplies?

"A. Most of the time. Mr. Nelson subbed for me in a lot of instances when I was away.

"Q. But primarily you were in charge of purchases is that correct?

"A. That is right.

"Q. And the supplies used by your company?

"A. That is right.

"Q. Now, directing your attention to the Puget Sound Pulp and Timber Company, you did business with that company? "A. Yes.

"Q. Your company did business with that company? "A. Yes, sir.

(Deposition of Thomas Guy Emmons.)

“Q. And tell us approximately when your company started to do business with that company.

“A. I have got a very poor memory on dates, but it was prior to 1948 when we bought our first materials from the Puget Sound. [197]

“Q. At that time did they have a paper board division? “A. No, they didn't.

“Q. What type of materials did you buy from them at that time?

“A. Bought just straight unbleached sulphite pulp in large sheet bales, which we shipped down here and subdivided into smaller size sheets to fit the lettuce crates.

* * * * * [198]

“Q. And in what capacity did you meet Mr. O'Reilly?

“A. Well, I was in Bellingham seeking for supplies, and Mr. O'Reilly, as I understood it, was the manager and part owner of the Bellingham Paper Products Company.

“Q. I see. And at that time did you make arrangements with him concerning the type of product that your company would purchase from the Paper Board Division or from—after the mill was going to be put into operation?

“A. Yes, sir.

“Q. And will you please describe briefly what that was going to be.

“A. Well, Mr. Roberg whom I had formerly been doing business with in regard to these orders told me, 'You can do business with Joe from now

(Deposition of Thomas Guy Emmons.)

on.' And I went into Joe's office and explained to him just what we needed, and it was an absorbent sheet with characteristics of a blotter, to be cut to sizes to fit the lettuce crate. And also we asked that they incorporate into the making of that sheet the introduction of synthetic resins to give it more strength [199] when wet, which they were unable to do for us when we were buying from the pulp mill direct. The construction of that sheet was something that Mr. O'Reilly worked out in the board mill, and it proved very successful.

"Q. Did you continue to buy that sheet, and that product, from the Puget Sound Pulp and Timber Company after the mill was put into operation, is that right?

"A. Well, the first shipments were purchased from the Bellingham Paper Products Company.

"Q. And then subsequently——

"A. (Interrupting) Subsequently the Puget Sound Pulp and Timber Company, at the time when the two concerns made the change, I don't know just when that happened.

"Q. Then, you continued to do business with Mr. O'Reilly on behalf of your firm and Puget Sound Pulp and Timber Company, did you not, during the years 1949, '50, '51 and part of '52?

"A. That is right.

"Q. That is correct. Now, directing your attention to September 1, 1951, to March 1, 1952, did you have any contact with Mr. O'Reilly concerning the products that were being purchased by your

(Deposition of Thomas Guy Emmons.)

company from Puget Sound Pulp and Timber Company?

"A. Yes, a number of times.

"Q. Tell us how, in what manner, you had those contacts with Mr. O'Reilly during that period. [200]

"A. Well, as Mr. Nelson explained to you, we were desperate for getting some supplies during that last quarter of 1951, and Mr. O'Reilly was not always at the Puget Sound office. So I contacted him personally by telephone, and in person at the mill he was constructing in Richmond.

"Q. You also contacted him at home on some occasions?

"A. I was at his home, but I don't remember transacting any business there.

"Q. But you did discuss the matter of purchases of the paper that you had purchased from Puget?

"A. That is right.

"Q. When you had these conferences with him?

"A. Yes, sir.

"Q. Now, will you tell us, please, what the primary purpose of your contacts were with him during your contact during the period September 1, 1951, and ending about March 1, 1952.

"A. We were interested in securing a greater and more secure source of supply for obtaining this pulp pad, and for that reason we were very much interested in seeing Mr. O'Reilly complete his mill in Richmond as a second source of supply for purchasing our lettuce pads.

(Deposition of Thomas Guy Emmons.)

“Q. What was your primary source of supply at that time?

“A. Puget Sound. [201]

“Q. And your contacts were with him during this period. Did any of those contacts relate to your purchases and your shipments that you were receiving from Puget Sound Pulp and Timber Company?

“A. Yes, I am quite sure they were.

“Q. Are you positive of that?

“A. Yes.

“Q. Now, did you at any time learn that Mr. O'Reilly was going to separate from the Puget Sound Pulp and Timber Company, paper board division?

“A. I learned that in the first quarter of '52. I don't remember what the date was.

“Q. You learned that during the first quarter of 1952?

“A. Yes.

“Q. And do you recall from whom you learned that?

“A. Mr. O'Reilly himself.

“Q. Did you—when did you first find out directly from any representative of the Puget Sound Pulp and Timber Company that Mr. O'Reilly was separating from that company?

“A. I can't recall the dates of that.

“Q. Just approximately?

“A. It was during that first quarter of '52.

“Q. During the first quarter of '52. And would you say that prior to the time that you—withdraw that. I will restate the question. When did you

(Deposition of Thomas Guy Emmons.)

first observe any [202] change in the processing of your orders by Puget Sound Pulp and Timber Company?

“A. Well, it is hard to recall the change there.

“Q. To the best of your recollection.

“A. I believe it was in the first quarter of '52.

“Q. And what change did you observe, if any?

“A. Well, most of the change we observed was that we were telephoning to Mr. Critzer, the mill superintendent, the paper board mill superintendent, and Mr. De Lopez, and very often in regard to getting out shipments. And it was a tendency at that time to—I don't know whether it was an effort on the part of the board mill to save money on the product, but we had trouble with the product that they were turning out and had to call Mr. Critzer and complain a number of occasions during the time that they were taking the thing over from Mr. O'Reilly.

“Q. That was during the early quarter of 1952?

“A. Yes.

“Q. The first quarter. Now, let me ask you this question, Mr. Emmons. Directing your attention again to the period commencing with September 1, 1951, and ending about March 1, 1952—during that period did you, or did you not, receive any telephone calls from Mr. O'Reilly at your plant here in Salinas with regard to purchases and shipments that you had made, or that were being processed between [203] your firm and Puget Sound Pulp and Timber Company?

(Deposition of Thomas Guy Emmons.)

"A. I am pretty sure we did.

"Q. And do you recall whether or not, and isn't it a fact that Mr. O'Reilly made some of those telephone calls from Richmond, California?

"A. Yes.

"Q. And those calls, would you say to the best of your recollection at this time, pertained primarily to the purchases that were being processed and the supplies that you were buying from Puget Sound Pulp and Timber Company?

"A. Well, we talked about a good many subjects, but that was one of the subjects.

"Q. That was the thing that he talked to you about? "A. Yes.

"Q. Now, isn't it a fact, Mr. Emmons, that during the year 1950 and during the early part—during 1951, Mr. De Lopez, to your knowledge, acted as traffic manager for Puget Sound Pulp and Timber Company? "A. I believe so.

"Q. And you had conversations with him during the period that I have just mentioned with regard to your shipments?

"A. No, no, I never did talk to Mr. De Lopez.

"Q. Whom other than Mr. O'Reilly did you speak to [204] during that period?

"A. Either Mr. O'Reilly or Mr. Roberg.

"Q. Mr. Roberg. And did you continue to talk to Mr. Roberg with regard to your purchases after Mr. O'Reilly left Puget Sound Pulp and Timber Company?

(Deposition of Thomas Guy Emmons.)

"A. I believe I did talk to Mr. Roberg on one occasion—during the first quarter of 1952.

"Q. Do you recall whether on that occasion Mr. Roberg mentioned anything about Mr. O'Reilly's separation from the Puget Sound Pulp and Timber Company? "A. I believe he did.

"Q. And that was—would you say that was the first time to your recollection that he had mentioned that?

"A. First time he had mentioned it, yes.

"Q. And that was in——

"A. (Interrupting) That was some time in the first quarter of 1952.

"Q. Now, subsequent to March 1, 1952, you continued to do business with the Puget Sound Pulp and Timber Company, paper board division, did you not? "A. Yes, sir.

"Q. As a matter of fact, you are still doing business with that company?

"A. That is right.

"Q. Is it a fact that you are still buying the same [205] type of product you previously purchased when Mr. O'Reilly was associated with the Puget Sound Pulp and Timber Company?

"A. Yes, that is right.

"Q. Would you say there has never been any diminishment in the quantities?

"A. Oh, yes, there has been a decided diminishing of quantities; due to the difference in our methods of packing lettuce, the demand for that type of product has decreased.

(Deposition of Thomas Guy Emmons.)

"Q. About when did that decrease start?

"A. Well, it started pretty heavily in 1953.

"Q. But not prior to that, is that correct?

"A. No.

"Q. So that you could say, then, for the period commencing with March 1st, 1952, and at least until March 1, 1953, the general amount, or the quantities of supplies and the type of supplies that you purchased from Puget Sound Pulp and Timber Company remained constant?

"A. Fairly so, yes. [206]

* * * * *

Cross Examination

Mr. Short: (Reading.)

"By Mr. Lane:

"Q. Mr. Emmons, I think you testified that during the last half of 1951 you had several conversations with Mr. O'Reilly regarding the products you were purchasing from the Puget Sound Pulp and Timber Company? "A. Yes, sir.

"Q. Did you have any letters or correspondence with him during that time?

"A. No. We have searched our files here for letters and records of that kind, and there doesn't seem to be any.

"Q. Now, I think you testified that he was not always at the office of the Puget Sound Pulp and Timber Company at Bellingham; that you sometimes contacted him at Richmond, is that right?

"A. That is right.

"Q. Do you recall ever having any conversation

(Deposition of Thomas Guy Emmons.)

with him at Bellingham after September 1st, 1951?

"A. No, I can't pin it down to any specific date. I think most of the contacts I had with him after, if not all of them, were probably at Richmond.

"Q. At Richmond. You don't recall any time that you talked to him at Bellingham after that date?

"A. No, I don't remember calling him. [207]

"Q. When did you first learn that Mr. O'Reilly was starting a new company called the California Paper Mill Company?

"A. I don't remember just exactly as to dates. But I believe it was early in the year 1951.

"Q. I see. And when did you start ordering from that company?

"A. I don't remember the exact dates.

"Q. But your company did start ordering?

"A. We did start ordering some board from them, yes. I remember that the products we bought from the Puget Sound, from the paper board mill at Puget Sound, there were two products. One was this pulp lettuce pad and the other was the calendar paper board. That was used for printing and waxing.

"Q. That was what you were purchasing from the pulp company?

"A. Yes.

"Q. And you purchased the board from the California Paper Board Company, a similar product?

"A. Yes, that's right.

"Q. I believe you testified, that you first testified

(Deposition of Thomas Guy Emmons.)

that Mr. O'Reilly, in 1952, that he had left the pulp company, is that right?

"A. I believe that is right. [208]

"Q. During that period of time, and prior to that time, do you recall whether you had purchased any board from the California Paper Board Company?

"A. I didn't understand the question.

"Q. Prior to that time had you purchased board from the California Paper Board Company, to the best of your recollection?

"Mr. Bernbaum: What time are you talking about?

"Mr. Lane: That is 1952.

"Q. When you first learned from Mr. O'Reilly that he had left the pulp company?

"A. No, sir, his mill wasn't ready to turn out any products prior.

"Q. I see. So that prior to the time you learned from Mr. O'Reilly that he had left the pulp company, you had not purchased anything from the paper board company, the California Paper Board Company?

"A. That is right.

"Q. And then in 195—the year 1952, did you continue to purchase from the pulp company, as I understand your testimony?

"A. During the balance of 1952?

"Q. Yes. "A. Yes. [209]

"Q. And as I understand, approximately the same quantities as you had previously purchased from them?

"A. Yes.

(Deposition of Thomas Guy Emmons.)

"Q. I see.

"Q. Those quantities being all they would let us have.

"Q. And that is, you say, why you purchased from the California Paper Board Company as a secondary source of supply?

"A. That is right.

"Q. Do you keep track of your telephone calls with Mr. O'Reilly from Richmond?

"A. No.

"Q. You were in Mr. O'Reilly's home in Richmond, were you?

"A. I was there once, yes.

"Q. At that time no business was discussed, I believe you said?

"A. I don't believe there was. There was some other business that I had with Mr. O'Reilly, separate and apart from our orders of materials that I probably went to his home to discuss.

"Q. Yes. Was your company financially interested in the California Paper Board Company?

"A. Yes. [210]

"Q. And I believe you stated that you first learned of the formation of the California Paper Board Company in the early part of 1951, is that right?

"A. I believe that is right, I can't recall the date exactly.

"Mr. Lane: I believe that is all."

(Deposition of Thomas Guy Emmons.)

Redirect Examination

Mr. Short: (Reading.)

“By Mr. Bernbaum:

“Q. Mr. Emmons, isn't it a fact that you solicited Mr. O'Reilly in connection with a secondary source of supply, in addition to the supplies you were getting from Puget, in order to increase the source of supply of those materials which your company so badly needed? Isn't that correct?

“A. That is materially right, yes.

“Q. And this is particularly true in 1951?

“A. I think that is when it happened, yes.

“Q. It wasn't a case of where Mr. O'Reilly attempted to divert any business from Puget Sound Pulp and Timber Company?

“A. Absolutely not. We put \$40,000.00 into Joe's mill in order to get more supplies, and it was our effort, [211] not his, that made that business contact possible.

“Q. If you could have gotten more supplies of the kind you needed, as you got from Puget Sound Pulp and Timber Company, you would have been glad to buy that, would you not?

“A. Absolutely yes.

“Q. From Puget Sound Pulp and Timber?

“A. Yes. In fact, after we made an investment in Mr. O'Reilly's new mill at Richmond, he proposed to us that we divert more tonnage to his mill, and we stated at that time we did not want to jeopardize our position with the Puget Sound Pulp

(Deposition of Thomas Guy Emmons.)

and Timber Company on supplies. So we did not cut loose from them.

“Q. And you have continued to do business with them ever since? “A. That is right.

“Q. And you use them as your primary source of supply ever since, is that correct?

“A. That is right, yes.

“Q. In other words, the fact that you made an investment in this California Paper Board at the time you mentioned had absolutely nothing to do with the control of your source of supply or any change in the relationship between your firm and the Puget Sound Pulp and Timber Company, paper board division? [212]

“A. That is right.

“Mr. Bernbaum: That is all.”

Recross Examination

Mr. Short: (Reading.)

“By Mr. Lane:

“Q. Mr. Emmons, when did Mr. O'Reilly suggest to you the statement that you just made?

“Mr. Bernbaum: What was that?

“Q. When did Mr. O'Reilly suggest to you that you purchase more products from the California Paper Board Company?

“A. Well, it was during the time he was perfecting the operation of his new mill.

“Q. Can you fix it by a date, approximately?

“A. No, I can't pin down the exact date. It was

(Deposition of Thomas Guy Emmons.)

some time in 1952. Whether it was before March or after I couldn't say.

"Q. Might it be in 1951?

"A. No, it wasn't in 1951. Neither Mr. O'Reilly nor ourselves knew whether he could turn out a satisfactory product at that mill.

"Q. So it was after his mill opened up, was it?

"A. Yes.

"Mr. Bernbaum: I believe you stated it was in 1952? [213]

"The Witness: Yes.

"By Mr. Lane:

"Q. His mill opened up when, do you recall?

"A. It was early in 1952. I don't remember the date.

"Q. It wasn't in 1951, to your recollection?

"A. No."

* * * * *

The Court: This deposition of the witness Emmons is read and received in the record of this trial as a part of the plaintiff's case in chief with like effect as if that witness were personally present and had been sworn and orally testified from the witness stand. [214]

* * * * *

JOHN H. FRANKL

called as a witness on behalf of the plaintiff, being first duly sworn by the Notary, testified as follows:

(Deposition of John H. Frankl.)

Mr. Short: (Reading.)

“Direct Examination

“By Mr. Bernbaum:

“Q. Mr. Frankl, will you please state your full name and your occupation?

“A. Occupation now or when?

“Q. Your occupation as of now.

“A. Partner with Laminated Paper Products Company. * * * * * [215]

“Q. Since you have been with Laminated Paper Products Company, and at least during the last five years, you have been in charge of purchases of supplies, including paper board such as used by your company, have you not? “A. Correct.

“Q. Please describe briefly what type of paper board your company uses and has used during the past five years that it purchased from Puget Sound Pulp & Timber Company or any other company.

“A. Up to this date?

“Q. Well, five years.

“A. Five years?

“Q. Commencing with 1950.

“A. The majority of it consisted of so-called double Manila lined news. Do you know how to spell it?”

Mr. Short: May I interrupt?

The Court: Wait just a minute. Off the record——

(Whereupon an off-the-record discussion was had.)

The Court: On the record, it is stipulated by and

(Deposition of John H. Frankl.)

between counsel that the business referred to by this witness so far by the name Laminated [216] Paper Products Company is a San Francisco business. You may now proceed.

Mr. Short: (Reading.)

“Q. L-a-n-d.

“A. Here is, for instance, an order for three hundred tons from Puget Sound, double Manila lined news.

“Q. Do you know Mr. Joseph O'Reilly?

“A. Yes, I do.

“Q. How long have you known him?

“A. To the best of my recollection, from 1947 on.

“Q. To this day? “A. Yes.

“Q. In what capacity did you know him in relation to Puget Sound Pulp and Timber Company?

“A. As a man that sold board from this particular mill to us and solicited business, sell board which we bought.

“Q. Did you know him in his capacity as an officer and sales representative of Bellingham Paper Products Company, prior to the time that he took over the Paper Board Division of Puget Sound pulp and Timber Company? “A. No.

“Q. You knew that he set up the mill, did you not, in Bellingham for Puget?

“A. Yes, I did. I mean, I knew the name of Joe [217] O'Reilly but I didn't know him personally.

(Deposition of John H. Frankl.)

“Q. Did you know in what capacity he was connected with the——

“A. Puget Sound, yes.

“Q. Will you please describe that briefly?

“A. To which period do you refer now?

“Q. From the beginning.

“A. Well, at the beginning I heard the name of Joe O'Reilly, didn't mean much to me, because at that time I was superintendent, and as such it is to buy or not to buy from him. But I knew his name and I knew the person of Joe O'Reilly, he was associated with Bellingham and did something which wasn't interesting to me.

“Q. Approximately when did you start doing business with him?

“A. Let me see now. With Joe O'Reilly?

“Q. In his capacity with Puget Sound Pulp and Timber Company.

“A. Well, the easiest thing to answer—I wouldn't know exactly.

“Q. Approximately.

“A. The first order we placed, which we could pick out?

“Q. We don't want to go into all that.

“A. I am not—let me see. It would be around '47, '48, I imagine. Yes. [218]

“Q. All right. That is good enough.

“In your capacity as part owner and also superintendent of Laminated Paper Products Company, you had occasion to handle the purchases of these products that you have described, did you not?

(Deposition of John H. Frankl.)

"A. Exclusively. Nobody else handled it but me.

"Q. Describe briefly your method of purchases from Puget Sound Pulp and Timber Company for the period commencing in 1950.

"A. Yes. Well, it was either by telephone, by calling up Joe O'Reilly in Bellingham, Washington, or Joe O'Reilly would drop in to solicit business.

"But you have to remember there was always at that particular time such a terrific shortage that most of the time we simply called him up and placed our written orders, just like I showed you now. That was the way to handle it.

"Q. So your method generally of doing business with Puget Sound was through telephone contact either directly with the plant or with Joe O'Reilly?

"A. Personally, and that was confirmed by a purchase order from us always; sometimes in a blanket order.

"Q. We are talking about the period commencing 1950 up to date. "A. Yes. [219]

"Q. Your company still does business with Puget Sound Pulp and Timber Company?

"A. The majority, ninety percent of it.

"Q. During the period commencing with 1950 and 1951 and 1952, for those three years, was there a short supply of the type of materials your company—— "A. Terrific shortage.

"Q. There was? "A. Terrific shortage.

"Q. Did you make purchases from other concerns other than Puget Sound Pulp and Timber Company? "A. Yes.

(Deposition of John H. Frankl.)

“Q. Did you do this continuously during the period I have mentioned?

“A. That's correct. But always remember the majority—when I say ‘the majority,’ as a rough guess I would say ninety percent was still received through Puget Sound, mostly through the influence of Joe O'Reilly.

“I mean he just provided us with enough board so we could stay alive.

“Q. There was always a short supply and you had difficulty getting your supplies?

“A. Terrific.

“Q. During the period we have just mentioned?

“A. Yes. [220]

“Q. Directing your attention to the period of 1951, the entire year of 1951, and the first quarter of 1952, did you make purchases of paper board such as you have described from Puget Sound Pulp and Timber Company?

“A. Continuously, up to this date.

“Q. During that period of time, in addition to making contact with Mr. O'Reilly—

“A. Repeat that. How was that?

“Q. During the period of time I have just mentioned—

“A. Fifty-one?

“Q. Fifty-one and fifty-two. During that period of time did you have contact with persons other than Mr. O'Reilly that were associated with Puget Sound Pulp and Timber Company?

“A. Yes. Russell De Lopez. But not as a salesman but rather connected with traffic. Russell De

(Deposition of John H. Frankl.)

Lopez sold later on after the years you just mentioned. But at the time you specified, Russell De Lopez arranged the traffic, to the best of my knowledge. That was my contact with him and that was the only person I knew beside Joe O'Reilly.

"Q. Did you have contact with Mr. Russell De Lopez during the early part of 1951 as well?

"A. That's right.

"Q. And 1950? "A. That's right. [221]

"Q. Was there anyone else other than Mr. Russell De Lopez at Puget with whom you had contact concerning your orders? "A. No.

"Q. During the period commencing with September 1, 1951, through February of 1952, or through March 1st, 1952, did you make purchases of paper board, such as you have described, from Puget Sound Pulp and Timber Company? Should I repeat that question? "A. Yes, please.

"Q. During the period commencing with September 1st, 1951, through February of 1952—

"A. Oh, yes.

"Q. —or through March 1st, 1952, did you make purchases of paper board, such as you have described, from Puget Sound Pulp and Timber Company?

"A. I am sure we got board at that time.

"Q. Did you make purchases then?

"A. It might have been covered by a previous blanket order. It could be covered easily.

"Q. We will hand you that in a minute.

(Deposition of John H. Frankl.)

"A. I am almost sure we did. I am almost sure we did.

"Q. Your answer would be yes, then?

"A. Yes. It might have been covered by a previous blanket order. [222]

"Q. You did receive deliveries during this period? "A. That's right.

"Q. As you stated, some of these deliveries, commencing with September 1, 1951, of purchases were based on purchase orders or letters entered into between your company and Joseph O'Reilly on behalf of Puget Sound Pulp and Timber Company, prior to September 1, 1951, is that correct?

"A. Yes.

"Q. Now, Mr. Frankl, I will hand you a statement covering the purchases made by your company from Puget Sound Pulp and Timber Company for the year 1951 and for the year 1952, and ask you to look at that. "A. Yes.

"Q. And ask you, to the best of your knowledge, whether that is a true and correct statement covering your purchases that were taken from your records.

"A. If it is taken from the records, it is correct. I mean, I haven't picked it out."

The Court: Wait just a moment. Do you intend to use that evidence to identify any document that has not already been identified?

Mr. Short: I think that the exhibit should be admitted.

The Court: Let plaintiff's counsel look at the

(Deposition of John H. Frankl.)

original ribbon number of the deposition which has been [223] filed and published in this Court and in this case. If opposing counsel wants to see what counsel is now looking at, he may approach plaintiff's counsel's table.

(Whereupon Messrs. Evans and Short examine the original ribbon copy of this deposition.)

Mr. Evans: We have photostatic copies of it, Your Honor. We have no objection to it.

The Court: Do you wish it to be marked as an exhibit in this case?

Mr. Short: Yes.

The Court: Let the Clerk remove it then and mark it.

Clerk: It will be marked Plaintiff's Exhibit No. 12.

(Record of Purchases marked Plaintiff's Exhibit 12 for identification.)

The Court: What was marked by Benard on January 12, 1955, in connection with the deposition of the witness Frankl has been marked by the Clerk at the Court's direction as Plaintiff's Exhibit 12.

You now offer that exhibit?

Mr. Short: I now offer Plaintiff's Exhibit 12 for identification. [224]

The Court: Any objection?

Mr. Evans: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 12 received in evidence.)

(Deposition of John H. Frankl.)

The Court: You may proceed to read the deposition.

Mr. Short: I am at line 11, page 11. (Reading.)

"Q. This was taken from your records by your secretary.

"A. Provided it is in the records, then these figures are correct.

"Q. It is taken from your records.

"A. Unless my secretary made a mistake.

"Q. From your books.

"A. Unless she made a mistake in copying. I couldn't swear to these figures.

"Mr. Bernbaum: Off the record for a moment.

"By Mr. Bernbaum:

"Q. The books and the records with reference to your purchases made by your company from Puget Sound Pulp and Timber Company are under your supervision and direction and within your knowledge, is that correct? "A. Sure.

"Q. This statement represents the totals of your purchases [225] for the year 1951 and 1952, is that correct? "A. That is correct.

"Mr. Bernbaum: May that go into the record? May it be stipulated that go into the record?

"Mr. Lane: I will stipulate that he testifies that is what his books show.

"Mr. Bernbaum: There won't be any objection as to foundation?

"Mr. Lane: Not unless I find it is inaccurate, the method of proving it. I have no objection.

"Mr. Bernbaum: May it be stipulated that this

(Deposition of John H. Frankl.)

is a true and correct copy taken from their records?

“Mr. Lane: If that is what Mr. Frankl says.

“Mr. Bernbaum: So stipulated? All right, it will go in.

“Let that be marked Plaintiff’s Exhibit 1 of this particular witness’s deposition.

“(Thereupon the foregoing document, on the letterhead of Laminated Paper Products Company, dated January 12, 1955, was introduced and marked Plaintiff’s Exhibit 1.)”

The Court: Proceed, please. This exhibit that you are now talking about in the deposition has already been admitted. Proceed.

Mr. Short: On line 20, Mr. Bernbaum. [226]

Mr. Bernbaum: (Reading.)

“The Witness: Of course, these figures must synchronize with the accounts receivable.

“Mr. Bernbaum: She took them right off the book.

“The Witness: From the Puget Sound Pulp and Timber Company. It is obvious.

“By Mr. Bernbaum:

“Q. Directing your attention again to the period between September 1st, 1951, to March 1st, 1952, during that period were you contacted by Mr. Joseph O’Reilly with regard to any purchases of board from Puget Sound Pulp and Timber Company? “A. Yes.

“Mr. Lane: What period of time was that?

“Mr. Bernbaum: September 1st, 1951, to March 1st, 1952.

(Deposition of John H. Frankl.)

“Mr. Lane: Your testimony was ‘Yes’?”

“The Witness: Yes.

“By Mr. Bernbaum:

“Q. How and in what manner were you contacted by Mr. Joseph O'Reilly during this period?”

“A. The same way as before: either we called him up or he called us up—basically no difference.

“Q. On approximately how many occasions during this [227] period could you tell us, to the best of your recollection, that you were contacted by him?”

“A. That is something I cannot answer.

“Q. Just approximately.

“A. It would be very—I would say—I would feel that I would have contacted O'Reilly each time I needed board, which would have been at least, roughly, once a month; or vice versa, he would have contacted us, unless, again, it was covered by large blanket orders in advance, you see.

“Q. During this period did he contact you in connection with purchases of paper from Puget Sound Pulp and Timber Company or was it on behalf of any other company he contacted you during this period?”

“A. I personally was contacted with regard to Puget Sound, purchasing of the board from Puget Sound.

“Q. Were you ever advised by Mr. O'Reilly or any other representative of Puget Sound Pulp and Timber Company as to when Mr. O'Reilly was go-

(Deposition of John H. Frankl.)

ing to separate his activity from Puget Sound Pulp and Timber Company? “A. No.

“Q. Directing your attention to March 1st, 1952, and subsequent to that date, and up to the present time, did you make any purchases of supplies from Puget Sound Pulp and Timber Company? [228]

“A. Continuously.

“Q. And to this date and in the future you are contemplating making purchases from Puget Sound Pulp and Timber Company, is that correct?

“A. That is correct.

“Q. Subsequent to March 1st, 1952, with whom or with what representative of Puget Sound Pulp and Timber Company did you handle your purchases? “A. Subsequently?

“Q. After March 1st, 1952.

“A. First Russell De Lopez and lately Roy Anderson, and now exclusively Roy Anderson.

“Q. But that was definitely commencing with approximately March 1st, 1952, to the best of your recollection, is that correct?

“A. That is correct.

“Mr. Bernbaum: That is all.

“Cross Examination

“By Mr. Lane:

“Q. Mr. Frankl, you testified that after September the 1st, 1951, Mr. O'Reilly contacted you or you contacted him regarding purchasing of pulp from the Puget Sound Pulp and Timber Company.

“A. Board.

(Deposition of John H. Frankl.)

“Q. Board? “A. Yes.

“Q. Did you have any correspondence with him during that time?

“A. With him or with Puget Sound?

“Q. Well, either with Mr. O'Reilly or with Puget Sound.

“A. Oh, yes. Continuously. Could have been concerning traffic, how a car would have been directed; could have been a wire from Puget Sound which I get—like we get each time: ‘Your order number,’ so-and-so, ‘was shipped via line,’ car and so on.

“It would be a little piece of correspondence, by saying, ‘I can not make your board by the specified time,’ or ‘You have to wait a couple of weeks.’ It would be within the range of our board purchases, I would say.

“That was specifically with Joe O'Reilly or with Russell De Lopez at this particular time, I can't remember that. But it could have been with both or with one or the other.

“Q. Would you have your correspondence that you had with Mr. O'Reilly from September 1st, '51, on?

“Mr. Bernbaum: Just a moment, Mr. Lane. I think he has already answered that question. [230] In other words, he has answered that the correspondence wouldn't necessarily be with O'Reilly, it would be with Puget Sound.

“It might be with De Lopez.

(Deposition of John H. Frankl.)

"The Witness: It was never with Joe O'Reilly personally, under no circumstances.

"By Mr. Lane:

"Q. You never had any direct correspondence with Mr. O'Reilly?

"A. Personally with him?

"Q. Yes.

"A. No. I would call him up or write him to Puget Sound, attention Joe O'Reilly, and start my letter, 'Dear Joe,' or something like that.

"Q. After September 1st, 1951, if you wanted to talk to Mr. O'Reilly, where did you call him?

"A. After September——

"Q. Yes. "A. ——1st, '51?

"Q. Yes.

"A. Was it already when he was in Richmond? I don't remember that.

"Q. I am asking you if you remember. You testified that you talked to him approximately once a month from September 1st, 1951, on. [231]

"A. Yes. But you asked me where.

"Q. Where did you call him? Where did you call him?

"A. It could have been Richmond. It could have been Richmond, dropped in here—three alternatives: he came in, call him in Richmond or Bellingham. It was one or the other.

"Q. Do you recall talking to him in Bellingham after September 1st, 1951?

"A. I wouldn't swear to that. You said Bellingham, now?

(Deposition of John H. Frankl.)

“Q. Yes.

“A. That I could not swear. I couldn't swear to that. But I am sure I talked to him; whether from Bellingham, that is a little hard to remember.

“Mr. Bernbaum: In other words, you are sure you spoke to him on many occasions after September 1st, 1951?

“The Witness: Yes.

“Mr. Bernbaum: But you don't know where?

“The Witness: Where or when.

“Mr. Bernbaum: But you don't know from where the conversations emanated?

“The Witness: I could dig up the correspondence and that would cover whether we directed letters to Bellingham or Joe O'Reilly came in. I could not answer [232] truthfully whether we called him in Bellingham or he dropped in here.

“But I am sure we did business together, if that is what you mean.

“By Mr. Lane:

“Q. All of your orders were placed over the telephone, were they, for paper board?

“A. Some over the telephone, but all of them confirmed. [233]

* * * * *

“Q. I was just wondering if you recall those were confirmed with Mr. O'Reilly after September 1st, 1951.

“A. Mr. O'Reilly didn't confirm the orders. The mill confirmed it. That is exactly—that is for years.

(Deposition of John H. Frankl.)

I can't recall any other form from Puget Sound than this one you see here, up to this date. [234]

* * * * *

"Q. Did you purchase board from the California Paper Board Company during that time?

"A. California? In Richmond?

"Q. From 1951 or '52.

"A. Not one ounce.

"Q. You never purchased from Mr. O'Reilly's new company?

"A. Not one ounce. I don't even know if he ever produced at this time our grade of board. If he would have—if he would have liked—if he was able to supply it, that I can't answer.

"Mr. Bernbaum: But you never purchased any?

"The Witness: No. [236]

* * * * *

"Q. Did you have knowledge as to when Mr. O'Reilly left the Puget Sound Pulp and Timber Company and went with the California Paper Company?

"A. I couldn't answer that question. But I could answer as follows: that everybody knew that Joe O'Reilly more or less simultaneously—he is an officer of Puget Sound and the same time associated with another mill, which sounded funny to me because it is an unusual procedure.

"But it wasn't interesting to me. It was besides the point.

* * * * *

"Mr. Bernbaum: California Paper Board did

(Deposition of John H. Frankl.)

not solicit any business from you during the period commencing September 1, 1951——

“The Witness: For California?”

“Mr. Bernbaum: For California Paper Board.

“The Witness: No.

“Mr. Bernbaum: To March 1st, 1952?”

“The Witness: No. He couldn't because he didn't make it. How can he sell board which he couldn't make? [237]

“Mr. Bernbaum: You never purchased any board or any supplies of any kind from California Paper Board?

“The Witness: No, sir.

“Mr. Bernbaum: Either during the period commencing September 1, 1951, or to this date, is that correct?

“The Witness: That is correct.

“By Mr. Lane:

“A. Do you recall, Mr. Frankl, when you stopped contacting Mr. O'Reilly or when he stopped contacting you? Is there any way you can fix that approximate date?

“Mr. Bernbaum: You mean on behalf of California?

“Mr. Lane: On behalf of the Puget Sound Pulp and Timber Company.

“Mr. Bernbaum: Paper Division?

“Mr. Lane: Yes.

“The Witness: I mean, if I go dig out—dig around in our correspondence, then I could answer. But offhand, just like that, I couldn't answer that.

(Deposition of John H. Frankl.)

But I would have to dig in our correspondence. That would be easy. I mean, it was very simple because when Joe O'Reilly left, so to say, or disappeared from the scene, then the man—then Russell De Lopez came and tried to sell, and sold; which exact date it was, it is hard to determine. [238] I couldn't tell you that.

“By Mr. Lane:

“Q. Mr. Frankl, Mr. O'Reilly claims that he performed service for the Pulp Company after September the 1st, 1951, up to and during the end of February, '52, and we don't think he did.

“Now, during that period of time did you contact him or did he contact you with reference to purchase of paper board from the Pulp Company?

“A. Oh, yes.

“Q. You are positive of that?

“A. Oh, yes. Either I contacted him, or if I didn't contact him I certainly bought from Puget Sound, being——

“Q. Do you recall whether you contacted him or he contacted you during that period of time?

“A. Offhand I would say that Joe O'Reilly came more often to us, to our office, than vice versa, than I would call up.

“Q. I am referring to that particular time.

“A. Yes.

“Q. You are sure of that?

“A. Oh, yes. Yes. Oh, yes. There was nobody else. I mean, the question is very simple.

(Deposition of John H. Frankl.)

“Mr. Bernbaum: That is all right. You have answered the question. [239]

“The Witness: There was nobody else here.

“Mr. Lane: That is all I have.

“Mr. Bernbaum: Just one question.

“Redirect Examination

“By Mr. Bernbaum:

“Q. Would you say to the best of your recollection at this time, that it was subsequent to March 1st, 1952, that you were contacted by somebody else from Puget Sound Pulp and Timber Company?

“A. I couldn't recollect. I couldn't answer that.

“Q. But you do know that during the period we have mentioned you were contacted or——

“A. You pin me down to a specific date and that I couldn't answer yes or no. But I know we bought board at this time, that I know, and I know we bought it—that my personal impression, rightly or wrongly, was that Joe O'Reilly still sells board, for whatever reason.

“Q. You do remember specifically during the period September 1st, 1951, to March 1st, 1952, that either you contacted Mr. O'Reilly or he came to your plant?

“A. That is correct. [240]

* * * * *

“Recross Examination

“By Mr. Lane:

“Q. Could you confirm that in any way by looking at your records, Mr. Frankl?

(Deposition of John H. Frankl.)

“Mr. Bernbaum: Well, I don’t know whether his records would show that, according to his testimony.

“Mr. Lane: Let him testify whether his records would show that.

“Mr. Bernbaum: You mean whether his records would show, Mr. Lane, whether he had a telephone call or whether he had a visit from Mr. O’Reilly?

“Mr. Lane: Or whether he put in an order——

“The Witness: It would be on one of the invoices still on hand that there is the copy of our purchase order showing ‘Attention: Joe O’Reilly;’ it could be. Whether that will be the case, I can’t answer that.

“But basically that is besides the point because at the time—which is not in doubt as to Joe O’Reilly activities, where we are all of us sure he worked for Puget Sound, I still placed orders with him and sometimes I put ‘Attention: Joe O’Reilly,’ and sometimes I didn’t.

“Mr. Bernbaum: You are talking now specifically [241] from the period September 1 to March—September 1, ’51, to March 1st, 1952?

“The Witness: That is correct.

“Mr. Bernbaum: That is all.

“By Mr. Lane:

“Q. You see, that is where one of the disputes in this litigation is; we don’t think Mr. O’Reilly performed any service from September, ’51 on.

“A. Who sold the board, then?

“Q. I beg your pardon?

“A. Who sold the board for Puget Sound as far

(Deposition of John H. Frankl.)

as we are concerned? Who sold for Puget Sound at this time?

“Q. Mr. O'Reilly left them.

“A. Yes. I know. But there was nobody else to sell board. * * * * * [242]

“(Thereupon the record was read as follows:

‘Q. Mr. Frankl, you have looked through your records for the period September, '51, through February, '52, and do you find anything in your records indicating that you contacted Mr. O'Reilly or that he contacted you in connection with your purchase from [243] the Puget Sound Pulp and Timber Company of paper board?’)

“Mr. Bernbaum: What is your answer?

“The Witness: The answer is yes. Here is, for instance, a letter to Joe O'Reilly, September 14th, 1951, specifically dated.

“By Mr. Lane:

“Q. Is that the only indication that you find in your file as to——

“A. There are many——

“Q. Will you just complete your examination?

“Mr. Bernbaum: Did you get the last answer?

“(Record read.)

“Mr. Lane: That is a letter to the Pulp Company dated September 14th, 1951, attention Joe O'Reilly.

“The Witness: And that indicates specifically that I wanted—expect board through Joe O'Reilly.

“By Mr. Lane:

“Q. And it refers to a carload of paper board

(Deposition of John H. Frankl.)

that you wished to be shipped during the last week of September, '51, is that correct?

"A. That is correct.

"Q. Is there anything else in your file that would indicate direct contact with Mr. O'Reilly?

"A. Can I read another letter? [244]

"There is a letter addressed to Joe O'Reilly, dated August 28th, asking to delay shipment of a specific board towards the end of September.

"Q. That is dated what?

"A. August 28th, but refers to September transaction.

"Q. I am interested in the period from September, '51, until during '52, if you have it.

"Mr. Bernbaum: Other than those he has mentioned, you mean?

"Mr. Lane: Yes.

"Mr. Bernbaum: Let me ask him this question.

"Mr. Lane: Let him just look and see if he has any.

"Mr. Bernbaum: What we want you to look for particularly and only, Mr. Frankl, please, is just to see whether the letter or any records show any reference to a telephone call that you had, whether you actually made mention in your correspondence of a telephone call with Mr. O'Reilly, or how you handled that. Is that correct, Mr. Lane?

"Mr. Lane: Or whether he had any correspondence with Mr. O'Reilly.

"Mr. Bernbaum: Pertaining to a specific telephone call during that period.

(Deposition of John H. Frankl.)

"The Witness: None, with the exception of the [245] one I showed you.

"By Mr. Lane:

"Q. The one I mentioned?

"Mr. Bernbaum: September 14th letter?

"The Witness: That's right. * * * * *

"Further Redirect Examination

"By Mr. Bernbaum:

"Q. Mr. Frankl, will you please tell us whether or not it was a part of your records, of your method of keeping records in Laminated Paper Products Company, to keep a record of telephone calls or conversations that you had with any representative of Puget Sound Pulp and Timber Company during 1949, 1950, 1951 and 1952, and up to the present time.

"A. Well, I would—if a salesman drops in and sells board to me and I buy the board, I might write a letter and say, 'Confirming our conversation,' and so on; that I would.

"But I would not—even a telephone call. But there was no specific—there are no minutes kept to record telephone calls. [246]

"Q. You do not keep records of telephone calls and what they pertain to? "A. No.

"Q. As a general practice, as a method of keeping records by Laminated Paper Products Company? "A. No.

"Q. That was not your method of doing business? "A. No.

(Deposition of John H. Frankl.)

“Q. You kept no minutes of such telephone calls calls? “A. No.

“Q. And you did not do so in connection with your method of doing business with Mr. O'Reilly during the period of September 1, 1951, to March 1st, 1952, is that correct?

“A. That is correct.

“Q. You are at this time relying on your specific recollection of your telephone conversations with Mr. O'Reilly pertaining to your purchases from Puget Sound Pulp and Timber Company?

“A. That is correct.

“Q. Particularly with reference to the period that we have mentioned; that is, September 1, 1951 to March 1st, 1952, is that correct?

“A. That is correct.

“Mr. Bernbaum: That is all. [247]

“Further Recross Examination

“By Mr. Lane:

“Q. Mr. Frankl, in looking through your correspondence there covering the period from September 1st, 1951, through February, '52, did you find your correspondence that was directed to any particular person at the Pulp Company?

“A. Yes.

“Q. Who?

“A. Russell De Lopez. That is correct. * * * * *

“Further Redirect Examination

“By Mr. Bernbaum:

“Q. In looking through your records, you also

(Deposition of John H. Frankl.)

found reference to correspondence with Mr. Russell De Lopez prior to September 1, 1951, did you not?

"A. That is correct.

"Q. And that when you state that correspondence refers to Russell De Lopez, to what phase of your purchases from Puget Sound Pulp and Timber Company, both before and after September 1, 1951, does that correspondence refer to? [248]

"A. Repeat that once more, please.

"Q. In what capacity did you refer to Mr. Russell De Lopez in connection with the correspondence that you have reference to subsequent to——

"A. Well, the correspondence at this particular time refers to all kinds of transactions, to all kinds of transactions.

"Q. I am directing your attention now to Mr. Russell De Lopez and the correspondence you directed to his attention prior to September 1st, 1951.

"A. Yes.

"Q. What did that have reference to?

"A. Traffic.

"Q. Traffic. You mean time of shipment?

"A. Time of shipment, cancellation, postponement, routing of shipments, and so forth.

"Q. Was there any difference during the period commencing with September 1, 1951, through February, 1952?

"Mr. Lane: He has answered the question.

"Mr. Bernbaum: No, just a minute.

"Q. It still referred to traffic?

(Deposition of John H. Frankl.)

“A. No, no longer. At that particular—although Joe O’Reilly would have sold board to us and we have bought through him from Puget Sound, at this particular time I had to correspond automatically much more and [249] continuously more with Russell De Lopez because at this time for a reason which was none of my business, Joe O’Reilly wasn’t as readily available at Puget Sound, at Bellingham, as he was before that time.

“Q. You did keep contact with him?

“A. With whom?

“Q. Joe O’Reilly. “A. That is right.

“Q. That is definite? “A. Yes.

“Q. That is from September 1, 1951, to February, ’52?

“A. Yes, solely buying more board through him.

“Q. Through Mr. O’Reilly?

“A. But it shows through the correspondence more has been shown with Mr. De Lopez at that specific time because Joe O’Reilly wasn’t as readily available in Puget Sound. Before I could lift up the telephone and get him.

“Q. You did get in touch with Mr. O’Reilly all the time during that period?

“A. He would drop in, like I testified before.

“Mr. Bernbaum: That is all.

“Mr. Lane: That is all.”

The Court: This deposition, as read, of the witness John H. Frankl is received in evidence as a part of the plaintiff’s case in chief with like [250] effect as if that witness were present, had been

(Deposition of John H. Frankl.)
sworn, and was testifying orally from the witness stand.

Mr. Short: The plaintiff rests if the Court please.
* * * * * [251]

RALPH M. ROBERG

called as a witness by and on behalf of defendants,
having been first duly sworn, was examined and
testified as follows:

Direct Examination

* * * * * [252]

Q. (By Mr. Evans): Will you state your present occupation, please?

A. I am Vice President of the Puget Sound Pulp and Timber Company.

Q. How long have you held that position?

A. About ten years.

Q. I neglected to ask you—will you give us your home address?

A. 120 Hawthorne Road, Bellingham.

Q. Now, will you state what, if any, position you ever held with the Bellingham Paper Products Company?

A. When we first organized, I was President of the Bellingham Paper Products Company, and was until it was dissolved.

Q. Now, up until the time that company was dissolved, will you state whether or not you also carried on your functions as Vice President of the Puget Sound Pulp and Timber Company?

(Testimony of Ralph M. Roberg.)

A. I did.

Q. Now, during the period of time that Bellingham Paper Products Company was in existence, will you state who actively managed that company?

A. Mr. O'Reilly was the active manager of the company.

Q. Will you state whether or not you or any one else [253] interfered with his method of managing it? A. No, I would say not.

Q. Now, will you state whether or not you had any part in any decisions as to whether the building which houses the paperboard mill would be built to a capacity to accommodate two machines rather than just one?

A. I would say that was—the policy of that was more or less decided by meetings with other members of the company, other executives of the company.

Q. Will you state whether or not Mr. O'Reilly was a member of the board of the paperboard company?

A. He was on the Board of Directors, yes.

Q. Will you state what were the considerations that led to the building being built so as to accommodate two machines rather than just the one?

A. Well, there were many things that we thought of and discussed at the time, but I think one of the first points that came up was that we had previously spent a considerable amount of money and research to look into the plywood overlay of pulp, and we left a place there either for a paper machine or for

(Testimony of Ralph M. Roberg.)

some other kind of machine that would do that job.

Q. Now, will you state whether or not at any time you had any conversation with Mr. O'Reilly with regard to reducing the rate of his commission?

A. Yes.

Q. Do you recall approximately when that conversation took place?

A. It was on a—I think the 28th of January 1949.

Q. Will you tell us where that conversation took place?

A. It took place in my office. Mr. O'Reilly came to my office.

Q. Was there any one else present beside you and Mr. O'Reilly? A. No.

Q. Will you tell us, as near as you can remember, what was said by both you and Mr. O'Reilly with regards to this subject?

A. With regard to that particular matter ?

Q. Yes.

The Court: Read the last three questions and answers.

(Whereupon the last three questions and answers are read by the court reporter.)

A. Mr. O'Reilly said he was going to voluntarily reduce his sales commission from three percent to one and one-half percent, and I asked him what prompted it, and he said he thought the business wasn't doing too well. I said: "That is self evident."

That practically concludes the conversation as far as that matter is concerned.

(Testimony of Ralph M. Roberg.)

I then called our accounting department. We agreed—pardon me—we agreed previously to set the date as of January 1, 1949. I called our accounting department and they either asked me to give them a memorandum to that effect or I write a memorandum and send it to them to that effect or I ask them, so I thereupon called a secretary and dictated a memorandum to that effect.

Q. Will you state whether or not the preparation of such a memorandum is a matter of regular business practice?

A. In a matter of finances, yes. In a matter of business, many other memoranda are not dictated.

* * * * *

Q. (By Mr. Evans): You have been handed what has been marked for identification as Defendants' Exhibit A-10. Will you state whether or not you can identify that? [256] A. Yes.

Q. Without reading from it, can you tell us what it is?

A. A note to Mr. Rogers that Mr. O'Reilly had voluntarily reduced his commission.

The Court: Do not state what is in it.

Q. (By Mr. Evans): State whether or not you signed the piece of paper which is marked Exhibit A-10? A. I did.

The Court: Whose signature is on the paper, if you know?

Witness: That is my signature. I signed it on this date.

The Court: You may proceed.

(Testimony of Ralph M. Roberg.)

Mr. Evans: I will now offer Exhibit A-10 solely for the purpose of fixing a date.

Mr. Short: I think the document is objectionable as being self-serving.

The Court: You have not proved it is a business document I believe, and you may offer further testimony if you wish to do so.

Mr. Evans: Very well.

The Court: Counsel made some statement about what he intended to prove regarding that, but I do not [257] remember hearing the proof. Proceed.

Q. (By Mr. Evans): Will you state whether or not memos of this type are made by you and others in your organization as a matter of usual course of business?

A. Matter of usual course of business.

Q. Will you state whether or not this memorandum was made in keeping with that business practice? A. Yes.

Q. Will you state what is the purpose of making such memos of this type?

A. What is the purpose?

Q. Yes.

A. To advise the accounting department as effective as of that date the commission is reduced.

* * * * * [258]

Q. (By Mr. Evans): Will you state whether or not Exhibit A-10 for identification was prepared by you as a permanent record of some event or transaction? A. This document?

Q. Yes.

(Testimony of Ralph M. Roberg.)

A. It should be a permanent record if it is kept in the file in the accounting department.

Q. Will you state whether or not it is the business practice and custom in your organization to retain such memos as a part of your permanent record? A. It is.

Q. Will you state who Mr. Clayton Rogers is, please?

A. Mr. Clayton Rogers is our head accountant.
* * * * * [260]

Q. Will you state whether or not Exhibit A-10 is addressed to Mr. Clayton Rogers?

A. It is.

Mr. Evans: I will now reoffer Exhibit A-10.

Mr. Short: Same objection if the Court please.

The Court: Do you wish the statement you made in connection with the offer to still pertain or do you wish to withdraw that statement and make an offer, a new offer, or what is your wish?

Mr. Evans: My sole purpose in offering it, and I am willing to let it be limited, is to fix a date.

The Court: For that limited purpose it is offered as I understand it. Do you so understand?

Mr. Short: I understand that, Your Honor. The objection is the same, together with the additional objection that by his own testimony this witness is not the custodian of this record and is not qualified to testify as to the matters he just referred to.

* * * * * [261]

The Court: That objection is overruled.

* * * * *

(Testimony of Ralph M. Roberg.)

Mr. Evans: I am offering this for the purpose of fixing a date, the date of the conversation which this witness has just testified to, being Jan. 28, 1949.

Mr. Short: May it please the Court, it was not used, as I understand, by Mr. Evans to refresh this witness' recollection, which is now the stated purpose of the offer.

The Court: The objection is overruled.

Defendants' Exhibit A-10 is now admitted for the limited purpose stated by counsel offering it.

* * * * *

Q. (By Mr. Evans): Now, Mr. Roberg, will you state whether or not in the conversation with Mr. O'Reilly there was any mention as to whether the reduction was to be for any period of time?

A. None whatsoever.

Q. Now, will you state whether or not at any time thereafter Mr. O'Reilly made any demand or even suggestion that his compensation be increased over and above one and one-half percent?

A. He never did. * * * * * [263]

Q. (By Mr. Evans): Will you state whether or not you had any duties with regard to the paper-board division at the time you had the conversations with Mr. O'Reilly which you have mentioned?

A. Yes.

Q. What were those duties?

A. More or less executive duties and advisory duties.

Q. In what regard?

A. With regard to the paperboard business.

(Testimony of Ralph M. Roberg.)

Q. Who was managing the paperboard mill at that time?

A. Mr. O'Reilly

Q. After Puget Sound took over the paperboard up until September of 1951, who actually managed and ran the paperboard division?

A. I would say that I more or less did.

Q. What duties did Mr. O'Reilly have?

A. He had none.

Mr. Short: This was after what date? I am sorry.

Mr. Evans: May I ask the reporter to read the last two questions and answers?

(Whereupon the last two questions and answers are read by the court reporter.) [265]

A. He had none.

The Court: After?

Witness: After taking over the board division. I misunderstood. After the Puget Sound Company took over the board mill from the Bellingham Paper Products, Mr. O'Reilly was still managing it until he left the company. * * * * * [266]

Q. (By Mr. Evans): Mr. Roberg, do you recall approximately when Mr. O'Reilly left the employ of Puget Sound Pulp and Timber Company?

A. Final departure?

Q. Yes.

A. September 1, 1952, I believe. * * * * * [269]

Q. Between September 1, 1951 and the first of March, 1952, did you have any communication with Mr. O'Reilly? A. None whatsoever.

(Testimony of Ralph M. Roberg.)

Q. Will you state whether or not you were aware of any work Mr. O'Reilly was doing on behalf of Puget Sound Pulp and Timber Company?

A. I was not.

Q. Will you state whether or not to your knowledge Mr. O'Reilly ever again came into the premises of the Puget Sound Pulp and Timber Company between September 1, 1951 and March 1952?

A. Not to my knowledge, he did not.

Q. Will you state whether or not you were present yourself on the premises of the company during that period of time ?

A. I would say all the time.

Q. Now, will you state whether or not the California Paper Products Company, when it was in business and producing, was a competitor of the board division of Puget Sound Pulp and Timber Company? * * * * * [271]

A. Yes, they were competitors.

Q. (By Mr. Evans): Now, will you state whether or not the Salinas Wax Paper Company was a customer of Puget Sound Pulp and Timber Company before Mr. O'Reilly went to work for them?

A. Yes, they were for many years.

Q. Now, will you state whether or not the board division of Puget Sound Pulp and Timber Company was oversold by 40% during the period September 1, 1951 to March 1952?

A. I would say they are undersold.

Q. Will you state whether or not to your recollection any orders were procured during that pe-

(Testimony of Ralph M. Roberg.)

riod of time that were not attributable to any customers that Mr. O'Reilly had previously procured?

A. In the dilemma we were in, I believe it was February of that year that I personally communicated with New York, to our agents there who also handle export board business, and I solicited business for our mill. They went out to South Africa and obtained an order for approximately 40% or 50% of the capacity of the mill, on which we ran, and we were in good shape thereafter.

Q. Will you state what, if any, action would have had to have been taken had it not been for your efforts [272] in procuring the order which you have just mentioned and others of similar type?

A. We considered we would have to close down the mill for a period.

Q. Will you state whether or not Mr. O'Reilly had permission from you or any of the other officers of the company, to your knowledge, to go to Ottawa to negotiate a purchase of a new machine?

Mr. Short: Objected as immaterial, if the Court please.

The Court: Overruled.

A. No.

The Court: Will you state, Mr. Roberg, whether you or, to your knowledge, anybody else connected with the defendant company other than Mr. O'Reilly had anything to do with initiating his trip on the occasion last mentioned?

Witness: No, we did not.

(Testimony of Ralph M. Roberg.)

The Court: Was it a matter in his discretion to do or not to do as he pleased?

Witness: It was his choice. I wouldn't say it was his discretion.

Q. (By Mr. Evans): Will you state who took over the management of the sale of the paperboard division upon Mr. O'Reilly's departure? [273]

A. Mr. O'Reilly departed about the day after Labor Day in September, and I appointed Mr. De Lopez to go up and take charge of the sales and the order sheet, and he reported to me I think the next day full details on the situation.

Q. Will you state whether or not Mr. O'Reilly had any authority to be representing the Puget Sound Pulp and Timber Company after his departure in the early part of September, 1951?

A. I would say none whatever. * * * * *

Q. (By Mr. Evans): With regards to what I might call the chain of command, will you state whether or not Mr. O'Reilly was under you or over you?

A. At what time? Never was over me. I was over him at all times he was with the company.

Q. Will you state whether or not you were one of the immediate superiors to whom he should report at any time a report was required? [274]

A. I was. * * * * *

Cross Examination

Q. (By Mr. Short): Prior to Mr. O'Reilly's coming with the Puget Sound Pulp and Timber

(Testimony of Ralph M. Roberg.)

Company or its subsidiary, the Bellingham Paper Products Company, did either of those companies produce any paperboard? A. No.

Q. Then prior to Mr. O'Reilly's coming with the company, if the Salinas Wax Paper Company was a customer it was not a customer of paperboard, was it?

A. We didn't make exactly paperboard in the board mill. We made a lettuce pad which was a substitute for it on account of the war conditions.

Q. The Salinas Wax Paper Company was a customer of what type of product prior to——

A. The same type of product, lettuce pads.

Q. Did you manufacture lettuce pads at Puget Sound Pulp and Timber Company before you built a paper mill?

A. Yes, but in different form. We started with this company, if I may add, at the time of the war, with the Salinas Valley, about 1942 or '3. [275]

Q. Mr. Roberg, do you have any independent recollection, and by that I mean a recollection independent of any record, of the day or date upon which you and Mr. O'Reilly had your conversation in reference to his reducing his percentage?

A. Do I remember the date?

Q. Do you remember the date independently of any record?

A. I certainly made the record at the time it happened, and I have known that all the time, yes. It was on January 28th.

Q. You so testified? A. Yes.

(Testimony of Ralph M. Roberg.)

Q. You have so testified from this exhibit, the memorandum transmitted to Mr. Rogers?

A. That was dated the same day, yes.

Q. It would not have been necessary in the normal course of your business to have transmitted that memorandum to Mr. Rogers any time before February 1, 1949, would it?

A. I transmitted it immediately.

Q. That is not the question. It would not be necessary for the accounting department to compute his percentage of net sales until after January 31, 1949, would it?

A. That I would not know. I, however, should have the memorandum there so they can pay according to the [276] agreement.

Q. And you testified that you notified the accounting department orally before this memorandum was prepared?

A. About five minutes before.

* * * * *

Q. The building in fact was built, was it not, with a pit which would receive a paperboard machine?

A. That is right, a hole in the floor.

Q. Yes, similar to the hole in the floor, as you call it, in which the existing machine is now rested, isn't [277] that correct?

A. No, it is larger.

Q. Why?

A. Because we didn't know what kind of machine we were putting in there, and the machine

(Testimony of Ralph M. Roberg.)

that Mr. O'Reilly had and suggested was too small for a great modern production.

Q. Well, the other pit or floor recess for the proposed additional machine was larger and was constructed in accordance with a blueprint of a paperboard machine, was it not?

A. Varying sizes I believe would fit into that pit, I think from 98" to 104" in width. [278]

* * * * *

A. Well, the second floor is a concrete floor.

Q. Is there an opening in that floor?

A. That is the hole we are talking about. That is the open hole which is the hole in the floor, second floor.

Q. Is there also an opening in the ceiling above that? A. No.

Q. There is not? A. No.

Q. Over the existing paperboard machine which is now in operation, is there an opening in the ceiling?

A. No, not of any size. There would be a vent pipe.

Q. Well, isn't it a fact that this paperboard machine which is now in operation at the mill—I have never seen it—does it not operate on two floors?

A. The machine?

Q. Yes.

A. The drive is on the first floor. [279]

The Court: Mr. Roberg, it might be of some assistance to the Court to understand better the place which was left in the construction of the

(Testimony of Ralph M. Roberg.)

building to accommodate the installation of a machine later.

Witness: That is right. No decision was made as to what kind of machine or what it was for.

* * * * *

Witness: Supported the second floor, and the machines were to be there.

When we didn't put in the other machine, we used one floor for storage of paper stock and things of [280] that sort.

The Court: Was there any concrete foundation at the second floor level on which it was expected that that machine, if it was installed, would rest?

Witness: Naturally. There would be beams of sufficient strength to support a future machine.

The Court: Well, on that floor was there any depression left in the nature of a pit or an elevation below the normal elevation of the second floor?

Witness: There was left one panel or a section of it which we floored over when we came to no decision. [281]

* * * * *

Q. (By Mr. Short): Was there any change in operation of the board mill as between 1948 and 1949? A. Change in operation?

Q. Yes. A. In what way?

Q. In any way?

A. Always change in any operation.

Q. Well, I mean in any substantial way.

A. Not that I recall except—you mean as regards sales?

(Testimony of Ralph M. Roberg.)

Q. Well, as regards any method of production or any one's duties in regard to the paperboard division as between 1948 and 1949?

A. Oh, I think Mr. O'Reilly was——

Q. Who?

A. (Continued) Mr. O'Reilly was the manager of the board division.

Q. In both years?

A. Well, I can't recall your years.

Q. I am asking you in reference to 1948 and 1949. [282]

A. Yes, he was officially—I would say he was manager, but he wasn't around very much.

Q. And his duties and so forth were the same during that time, both before 1948 and after?

A. His duties were the same.

Q. Do you mean that in 1949 he wasn't around very much?

A. Well, I wouldn't want to pin it to any one year. He wasn't around very much at all. [283]

* * * * *

LAWSON P. TURCOTTE

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Evans): What is your present position?

A. President of the Puget Sound Pulp and Timber Company.

(Testimony of Lawson P. Turcotte.)

Q. How long have you held that position?

A. Since 1950.

Q. What was your position prior to that time?

A. I was Executive Vice President of the company from 1942 until I became President. [284]

Q. What was the general nature of your duties from 1942 until you became President?

A. I was manager of all the properties of Puget Sound Pulp and Timber Company, Executive Vice President and Manager. The President of the company resided at that time in San Francisco.

Q. What have been your duties since you became President?

A. Well, much the same except as to the name of "President" as against "Executive Vice President"—in charge of all of the operations of the Puget Sound Pulp and Timber Company.

The Court: Where did you work before you became connected with this company?

Witness: I came down from Canada, Your Honor.

The Court: How many years ago?

Witness: I have been with this company since 1926.

The Court: Before that, did you live in Canada?

Witness: Yes, in Alberta, and I was born in Quebec.

The Court: What kind of work did you do in Canada?

Witness: Accounting, and prior to that I was in the Army. [285]

(Testimony of Lawson P. Turcotte.)

The Court: What kind of accounting, and in what business, if any?

Witness: In lumber.

The Court: Did you have anything to do with pulp or paper manufacture or distribution?

Witness: Not at that time.

The Court: It was only since you came——

Witness: Since 1926.

The Court: (Continuing) ——since you came to this country that you have had anything to do with pulp or paper?

Witness: Yes, sir.

The Court: You may inquire.

Q. (By Mr. Evans): Mr. Turcotte, will you state whether you were ever aware of any demand or claim by Mr. O'Reilly for anything more than the one and one-half percent sales commission from **January 1, 1949** until the termination of his employment? A. I was not.

Q. Will you state whether or not you at any time had any conversations with Mr. O'Reilly with regard to the termination of his connection with Puget Sound? A. Yes, I did.

Q. Do you recall approximately when the first of [286] those conversations took place?

A. I would say right after we discovered that Mr. O'Reilly intended to form another corporation in California in the paperboard business, probably March or April of '51.

Q. Will you state whether or not that was just one discussion or were there several discussions?

(Testimony of Lawson P. Turcotte.)

A. As I remember, there were two or three discussions because the Board and myself thought that——

Mr. Short: Object to this.

The Court: Yes. Do not say what you thought. You can say what you said to him or what he said to you.

A. Well, I told Mr. O'Reilly that he could not serve as sales representative of the two companies with those companies in competition with each other—that is Puget Sound Pulp and Timber Company and California Paperboard Company.

Q. Now, will you state whether or not you suggested to Mr. O'Reilly a date upon which his services would be terminated?

A. Originally I suggested June 1.

Q. And what, if anything, did Mr. O'Reilly say to that?

A. Well, he seemed—he said that he thought he was not being treated fairly and that he would like to let [287] it go for another month or two, and I said: "All right." I said: "It can be August 31st or September 1st."

The Court: Of what year?

Witness: 1951. * * * * *

Q. (By Mr. Evans): You have been handed what has been marked Exhibit A-1, being a letter of July 12, 1951. Will you state whether or not you received that letter from Mr. O'Reilly?

A. I received it.

Q. Now, will you state whether or not prior to

(Testimony of Lawson P. Turcotte.)

that date you had made a proposal of termination of Mr. O'Reilly's services? A. I had.

Q. Will you state whether or not prior to July 12, 1951 you and Mr. O'Reilly had come to an agreement as to the date of his termination?

A. No. It was subsequent to this letter.

Q. Now, will you state whether or not after July 12, 1951, you and Mr. O'Reilly arrived at any agreement as to his termination date?

A. I don't know exactly this date, but it would be [288] after the latter part of July that Mr. O'Reilly and I met in my office and arrived at the agreement.

Q. Now, will you relate to us as accurately as you can remember this discussion you had with Mr. O'Reilly?

The Court: That date was what?

Witness: Of the letter?

The Court: No, the date you had this discussion.

Witness: The latter part of July.

Q. (By Mr. Evans): Of what year?

A. 1951. Mr. O'Reilly came into my office. I had this letter in front of me.

The Court: What letter is that?

Witness: Of July 12, 1951.

A. (Continued) We discussed the whole question of remuneration since the time Mr. O'Reilly came with the paperboard company as well as after dissolution of the company and his employment with Puget Sound Pulp and Timber Company.

At that time I had made some preparation as to

(Testimony of Lawson P. Turcotte.)

the discussions with Mr. O'Reilly in view of his letter. I told him what we had paid him during that period of from January 1, 1947 to the time of the meeting, which amounted to at that time something like a little under \$90,000.00 [289] in commissions. I also pointed out to Mr. O'Reilly that the company had purchased his stock which, on the basis of Mr. O'Reilly's contribution to the original paperboard company, was \$50,000.00, and for which we had paid him \$135,000.00. Taking his commissions——

The Court: Will you pause for just a minute, please? Will you read the last two sentences in his answer?

(Whereupon the court reporter read from the record as follows: "I told him what we had paid him during that period of from January 1, 1947 to the time of the meeting, which amounted to at that time something like a little under \$90,000.00 in commissions. I also pointed out to Mr. O'Reilly that the company had purchased his stock which, on the basis of Mr. O'Reilly's contribution to the original paperboard company, was \$50,000.00, and for which we paid him \$135,000.00")

The Court: Did you wish to indicate by that that he had paid for the stock \$50,000.00?

Witness: That is correct, Your Honor.

The Court: You may proceed.

A. (Continued) And that these two amounts of the sale of the stock and the commissions was in the neighborhood [290] of around \$185,000.00 that the

(Testimony of Lawson P. Turcotte.)

company had paid to Mr. O'Reilly during his tenure of approximately four and one-half years, and that I felt that he had been very fairly treated. At that time I made the remark that he had been paid more than the president of the company. So we talked it over and talked it over.

Mr. O'Reilly was proposing that he be paid commissions until December 31, 1952. I told Mr. O'Reilly that as far as separation date, that this was to be definitely September 1, 1951, and this was agreed upon. Thereupon, Mr. O'Reilly—Well, I am getting a little ahead—which was agreed upon as a separation date.

Mr. Short: Will you give the date again, please?

Witness: September 1, 1951.

A. (Continued) Thereupon Mr. O'Reilly continued with his conversation that he thought he had not been too fairly treated.

I remember that we discussed it for approximately one hour, and I finally made him the proposal that there was no question as to his termination date as an employee of Puget to be September 1, 1951, but that we would pay him at the same rate of one and one-half percent commission from September 1, 1951 to February 29, 1952.

Mr. O'Reilly accepted this proposal.

Mr. Short: I object to the conclusion if the [291] Court please.

The Court: The objection is overruled.

A. As far as I am concerned, Mr. O'Reilly accepted the proposal.

(Testimony of Lawson P. Turcotte.)

The Court: That objection is sustained as applied to the last remark, and the Court's ruling is set aside. The ruling now made by the Court is that the objection is sustained and the statement of the witness is stricken and the Court will disregard it.

Q. (By Mr. Evans): Will you state what, if anything, Mr. O'Reilly said in response to the proposal which you have just outlined?

A. Mr. O'Reilly accepted the proposal.

Mr. Short: The same objection.

The Court: In view of what has been said before, the Court feels the answer is not responsive and the objection is sustained and the answer is stricken.

I ask you to answer counsel's question, Mr. Turcotte.

Witness: Will you repeat the question?

The Court: Read Mr. Evans' question.

(Whereupon the question is read by the court reporter as follows: "Q. Will you state what, if anything, Mr. O'Reilly said in response to the proposal [292] which you have just outlined?")

A. I, of course, can't remember the exact words that Mr. O'Reilly used, but he did use words of acceptance of the proposal.

Mr. Short: Same objection and move to strike.

The Court: I think it should be stricken, and that is the order of the Court.

You may ask him what he recalls in substance and effect that Mr. O'Reilly said.

(Testimony of Lawson P. Turcotte.)

Q. (By Mr. Evans): Will you state what, in substance, Mr. O'Reilly said in response to your proposal which you have outlined?

A. Well, I just can't remember his exact words.

Q. Will you state the substance of what, if anything, Mr. O'Reilly said in response to your proposal?

Mr. Short: I think the question has been asked and answered, if the Court please.

The Court: That objection is overruled.

A. Well, as I remember, Mr. O'Reilly repeatedly stated that he thought he was not fairly treated. After my proposal to him, he said something like: "I guess that is it," and got up and left.

* * * * * [293]

Q. (By Mr. Evans): Will you state whether or not during your discussions with Mr. O'Reilly there was any mention of Mr. O'Reilly claiming an additional one and one-half percent commission over and above that which he had already received?

A. No.

Q. Will you state whether or not you were aware of any such claim for compensation or any such contention on behalf of Mr. O'Reilly?

A. I certainly was not.

The Court: Will you repeat for my convenience [294] what you said was the date that you said you told him his commissions would be paid to?

Witness: February 29, 1952, Your Honor.

The Court: Now, was there anything said on what basis——

(Testimony of Lawson P. Turcotte.)

Witness: At one and one-half percent rate based on the net sales of the company in those six months.

Q. (By Mr. Evans): Will you state whether or not your proposal was in any way influenced by Mr. O'Reilly's letter of July 12, 1951?

Mr. Short: I object to that. It is immaterial and irrelevant. What was in this man's mind would have no possible connection with what the contract or agreement actually was.

Mr. Evans: May it please the Court, I believe it is very relevant as to the state of the man's mind when he is entering into the contract as to whether or not he is relying upon a letter written by the person with whom he is dealing.

The Court: The objection is overruled.

A. Well, I certainly took into account that Mr. O'Reilly had reduced his commission from three percent to one and one-half percent when I made him the offer of the continuation of his one and one-half percent commission [295] for those six months.

The Court: What was it that he mentioned, if he did mention anything, as a detail of his feeling of unfair treatment during that conversation there that you mentioned that took place in July with the letter of July 12th before you?

Witness: Well, Your Honor, I could not understand why he felt that way. He had had——

The Court: (Interposing) I did not ask you that, Mr. Turcotte. I asked you what, if anything, he said about the details of his dissatisfaction. What

(Testimony of Lawson P. Turcotte.)

points did he make in that connection about what the company had done or had not done that he expected the company to do?

Witness: Well, he expected the company, according to his letter to continue his commission until the end of the contract or some date that he suggested.

The Court: What, if you know, was to be the end of the contract as stated by him or you on that occasion?

Witness: Well, if the five year contract had run, it would have been around the neighborhood that he suggested I think.

The Court: What did he suggest as the end?

Witness: He suggested December 31, 1952.

The Court: Can you think of any other details mentioned by him as a reason why he was unsatisfied with the deal he had received?

Witness: Yes. He made certain claims about the unsatisfactory quality of the raw materials going into the board. His main objection was to the condition of the screenings, which is a by-product of our pulp operation.

Now, those screenings as a by-product in the pulp operation—we always try to get every last fiber out for the higher priced product, and we are working all the time to reduce the screenings loss, which is a very cheap product, and we have done that continually.

The Court: What point was he making about it?

(Testimony of Lawson P. Turcotte.)

Witness: Well, he said they were not satisfactory for some of the production of board.

The Court: I still don't understand the detail that he complained about. Did he complain that more of those screenings should be saved and go into the paperboard that he was selling or less of the screenings?

Witness: He claimed that they should have been a better quality and more fibers left in the screenings. Well, our objective in making pulp is to get all the [297] good fibers out of the wood, and the screenings is a waste.

The Court: Did he talk about money that he was losing which he expected to receive from the company?

Witness: Well, he mentioned his voluntary reduction of commission.

The Court: And asked that that be restored, did he or not?

Witness: No, he did not. He asked that he be paid one and one-half percent commission, Your Honor.

The Court: But on this day in July 1951 is when I am talking about, not on that prior day when Mr. Roberg said that he voluntarily reduced his commission. I am talking about what he said on this date.

Witness: No. He never mentioned restoring it to three percent.

The Court: Can you think of any other detail of his expressed dissatisfaction other than what you

(Testimony of Lawson P. Turcotte.)

have mentioned already, which expression was made by him on that July date when you and he were discussing the details, further details, of his separation?

Witness: Well, he expressed dissatisfaction with his termination date, which was September 1st, and it was our proposal that at the same time his commissions would discontinue as of September 1, 1951.

The Court: You may inquire.

Q. (By Mr. Evans): Mr. Turcotte, will you tell us what part screenings play in the manufacture of paperboard?

A. Well, I am not an operating man, but the plant was originally constructed to use this waste product——

Q. Which product? Which plant?

A. The paper—the paperboard plant.

Q. Now, will you state whether or not there are one or two paperboard machines in the plant now?

A. There is one paperboard machine.

Q. If you were to install another machine, will you state where you would have to get your raw products——

A. Well, that would depend——

Mr. Short: Objected to as being entirely immaterial if the Court please.

The Court: Will you read the question?

(Whereupon the last question is read by the court reporter.)

The Court: The objection is sustained. No. The objection is overruled.

A. That would depend on what kind of boards

(Testimony of Lawson P. Turcotte.)

you were going to make. If we wanted to continue using our waste, the present machine takes all of it, and if we wanted to continue in the same grade as now, we would have to go [299] out and purchase screenings.

The Court: Suppose it is a question of your continuing the kind of work and the kind of product that he was dealing in. Just consider what he was dealing in. What about that?

Witness: We would have to go out and buy the raw materials instead of supplying it ourselves, and it would greatly have increased the cost of production. We felt it was not economical.

Q. (By Mr. Evans): Will you state whether or not the screenings that you now produce would support another machine? A. No.

Mr. Evans: Will you kindly hand the witness Exhibit A-2?

(Whereupon Defendants' Exhibit A-2 is handed to the witness by the bailiff.)

Q. (By Mr. Evans): You have been handed Exhibit A-2, which is a letter dated November 21, 1951 from Mr. O'Reilly to you? A. Yes.

Q. State whether or not that letter was received by you?

A. That letter was received by me, yes.

Q. Upon receipt of that letter, will you state whether [300] or not you took any action towards having Mr. O'Reilly's commission for September and October sent to him?

(Testimony of Lawson P. Turcotte.)

A. Yes. I passed it on to the accounting department and they sent him his checks.

Q. Will you state whether or not the check was sent at your direction?

A. That is correct.

Q. Now, can you tell us why there was a delay in sending the check for his commission for September and October?

A. Well, when the settlement was made with Mr. O'Reilly—

Mr. Short: I object to that and ask that that word be stricken—"settlement".

The Court: The objection is overruled.

A. (Continued) —when the settlement was made with Mr. O'Reilly, I had instructed the treasurer of the company that any checks passed on to Mr. O'Reilly during this six months' period should come through my office.

Mr. Short: I ask that it be stricken as hearsay.

The Court: Denied, and the objection is overruled.

A. (Continued) And the reason that these two checks were late is that I was in Europe during the month of October and the first part of November.

Q. (By Mr. Evans): Now, will you state whether or not at the time you received the letter of November 21st you had any information or any idea that Mr. O'Reilly was claiming anything in excess of the one and one-half percent commission mentioned in that letter?

A. None whatever.

(Testimony of Lawson P. Turcotte.)

The Court: What letter is that now? What date?

Witness: November 21, 1951.

Mr. Evans: Now, will you kindly hand the witness Exhibit A-3, letter dated April 7, 1952?

(Whereupon Defendants' Exhibit A-3 is handed to the witness by the bailiff.)

Q. (By Mr. Evans): Will you state whether or not you received Exhibit A-3, the letter from Mr. O'Reilly dated April 7, 1952? A. Yes.

Q. Now, will you state whether or not in response to that letter you took any steps toward sending Mr. O'Reilly a check for his commissions for February, as per his request? A. Yes.

Q. What, if any, steps did you take?

A. I checked with the treasurer of the company to see if the check had gone forward. If not, it was to be forwarded.

Q. Will you state briefly what was the reason for [302] the delay in his not having received his February commission as late as April 7, 1952?

A. Well, it was the same situation as previously. I was traveling in California and New York.

Q. Now, will you state whether or not at the time you directed that a check be sent to Mr. O'Reilly you had any inkling that he was claiming something in addition to his one and one-half per cent up through the month of February 1952?

Mr. Short: That is leading.

A. None whatever.

The Court: Read the question.

(Testimony of Lawson P. Turcotte.)

(Whereupon the last question is read by the court reporter.)

The Court: Overruled.

A. None whatever.

Q. (By Mr. Evans): Did you—will you state whether or not you relied upon the statements made in Mr. O'Reilly's letter of April 7, 1951 to the effect that this would be his last check?—1952, excuse me.

A. I certainly did.

Mr. Evans: Now, will you kindly hand the witness Exhibit A-4, please?

(Whereupon Defendants' Exhibit A-4 is handed to [303] the witness by the bailiff.)

Q. (By Mr. Evans): Now, Mr. Turcotte, will you state whether or not you sent Mr. O'Reilly the original of the Exhibit A-4, which is a carbon copy?

A. I did.

Q. And will you state what your intention was as expressed by your words in that letter?

Mr. Short: Object to that.

The Court: The objection is sustained.

Q. (By Mr. Evans): Will you state whether or not your intentions at the time of sending that letter——

The Court: (Interposing) I don't think that is proper, Mr. Evans. Ask him another question. You can ask him what he said if you have not already done so, or you can ask him what he said or what somebody else did or said, if the other person is Mr. O'Reilly, but the question you are now in the process of stating is objectionable.

(Testimony of Lawson P. Turcotte.)

Mr. Evans: For the purpose of the record, Your Honor, may I complete the whole question?

The Court: No. You may make an offer of proof.

Mr. Evans: Very well, if I may just very briefly. May it please the Court, what I propose to offer [304] by way of proof is that Mr. Turcotte intended to state exactly what he stated in the letter of April 8, 1952, and that was the purpose of my question.

Mr. Short: Object to the offer of proof.

The Court: Sustained.

Q. (By Mr. Evans): Now, Mr. Turcotte, did you ever again see Mr. O'Reilly around the premises of the Puget Sound Pulp and Timber Company after he left in the first days of September, 1951, for the next—say a year?

A. Never saw him.

Q. Will you state whether or not anything ever came to your attention that he had ever been there during that period? A. No.

Q. Will you state whether or not Mr. O'Reilly had any authority to represent Puget Sound Pulp and Timber Company after he left your offices in the first few days of September 1951?

A. None whatever after September 1, 1951.

Q. Will you state when was the first time you were aware that Mr. O'Reilly was making any claim for any additional compensation?

A. I believe it was the middle of 1953. I am not sure. [305]

Q. Will you state how that came to your attention?

(Testimony of Lawson P. Turcotte.)

A. I received a letter from Mr. O'Reilly.

Mr. Evans: Will you hand the witness Exhibit A-6?

(Whereupon Defendants' Exhibit A-6 is handed to the witness by the bailiff.)

Q. (By Mr. Evans): Will you state whether or not Exhibit A-6, letter dated June 5, 1953, refreshes your memory with regard to when you first heard of Mr. O'Reilly's claim for additional compensation? A. This is the first time.

Q. Now, will you state whether you would have taken any different action than you took had you known in 1951 that Mr. O'Reilly was making a claim for additional compensation?

Mr. Short: Objected to as speculative and argu-
The Court: Overruled. Read the question.

A. Well, I certainly would not have made him any offer of additional commissions from September 1, 1951, to February 29, 1952, if I had known.

Q. You now think you would have taken any other different action had you known during all the time that Mr. O'Reilly was going to make a claim for double his compensation he had received? [306]

A. Would you repeat that?

Mr. Short: Same objection, if the Court please.
It is utterly immaterial.

The Court: Overruled.

Read the question.

(Whereupon the last question is read by the court reporter as follows: "Q. You now think you would have taken any other different action

(Testimony of Lawson P. Turcotte.)

had you known during all the time that Mr. O'Reilly was going to make a claim for double his compensation he had received?")

Witness: I don't quite—would you read that again please?

Mr. Evans: I will rephrase it. Strike that.

Q. (By Mr. Evans): Will you state whether or not you would have taken any different action than you did take had you known all along from January 1949 that Mr. O'Reilly was making claim for double his amount of compensation?

A. Yes, I would have taken different action.

Q. What, if any, action do you now think you would have taken?

A. I would have referred it to our attorneys.

Q. Do you have any other opinion or idea now as to what action you might have taken——

Mr. Short: (Interposing) This is getting [307] extremely speculative.

The Court: Sustained.

Mr. Evans: Now, would you kindly hand the witness Exhibit A-9, please?

(Whereupon Defendants' Exhibit A-9 is handed to the witness by the bailiff.)

Q. (By Mr. Evans): You have been handed what has been marked for identification as Exhibit A-9. Without reading from them into the record or anything, can you tell us what they are?

A. This is a report on paperboard converting presented to me by Mr. O'Reilly for any action

(Testimony of Lawson P. Turcotte.)

that the company might have seen fit to take upon the report.

Q. Will you state whether or not there were other similar reports from time to time you have received from Mr. O'Reilly?

Mr. Short: Objected to as not the best evidence if the Court please.

The Court: Overruled.

A. I think there were probably one or two.

Mr. Short: Excuse me. Do you remember how this matter came up originally? It came up on the cross examination of Mr. O'Reilly. Counsel sought to impeach O'Reilly for having made the statement that while contacting customers he made no reports of [308] those contacts to the Bellingham office. These were then produced and excluded from evidence. Now, they are sought to be identified by this witness which is proper, but now the question to which the objection is made is are there reports other than those. The fact of the report is the impeachment that counsel seeks, not the content, because the content relates to absolutely nothing involved in this litigation.

The Court: The objection is overruled.

* * * * *

A. I received these two, plus probably one or two more. There were not very many reports made.

Q. (By Mr. Evans): Now, can you fix for us the approximate date that you received the two reports which are Exhibit A-9?

(Testimony of Lawson P. Turcotte.)

A. There is no date on them. I got them out of our 1950 file in the office.

The Court: That does not seem to me to answer the question. [309]

Witness: Well, I don't know, Your Honor.

The Court: You just do not know when you got them?

Witness: That is right.

Q. (By Mr. Evans): From the contents, without disclosing the contents, can you fix the approximate date when you received those reports?

Mr. Short: I believe he has answered the question.

The Court: Sustained.

Q. (By Mr. Evans): Will you state where those reports came from? A. From Mr. O'Reilly.

Q. Will you state where they were filed when you first found them?

The Court: Wait just a minute.

Miss Reporter, can you find the witness' statement in response to the Court's question—his answer about getting them out of the file?

(Whereupon the court reporter read from the record as follows: "By Mr. Evans: Q. Now, can you fix for us the approximate date that you received the two reports which are Exhibit A-9? A. There is no date on them. I got them out of our 1950 file in the office.")

The Court: That answers your question, does it not?

(Testimony of Lawson P. Turcotte.)

Mr. Evans: Yes.

Q. (By Mr. Evans): Will you state whether or not those reports reveal any statement of dissatisfaction on the part of Mr. O'Reilly as to how the board division was operated?

Mr. Short: I would object to his further inquiry on a document not in evidence.

The Court: That objection is sustained. You can have it marked, and if it is anything that may properly be received, we could in that way soon find out, and the Court sustains this objection.

Mr. Evans: Very well then. I believe I have laid the proper foundation and I will offer Exhibit A-9.

Mr. Short: It is objected to as completely immaterial, as previously argued.

The Court: May I see it?

On what issue do you offer the Exhibit?

Mr. Evans: If the Court will recall, Mr. O'Reilly admits he prepared those reports, and I am now offering them to show his report as to the operation of the company.

Mr. Short: That gives me no indication of what the ultimate fact that report, its contents, or any circumstance surrounding it establishes in this case.

The Court: The objections are overruled.

Defendants' Exhibit A-9 is now admitted.

(Defendants' Exhibit A-9 received in evidence.)

(Testimony of Lawson P. Turcotte.)

Cross Examination

Q. (By Mr. Short): Mr. Turcotte, did I correctly understand your testimony that your first conversation with Mr. O'Reilly in reference to the termination of his employment was immediately upon your discovery that he was about to operate or contemplated opening a board mill in California?

A. That is correct.

Mr. Short: May the witness be handed Exhibit A-7?

(Whereupon Defendants' Exhibit A-7 is handed to the witness by the bailiff.)

Q. (By Mr. Short): That letter is to yourself, is it not? A. Correct.

Q. From Mr. O'Reilly? A. Yes. [312]

Q. And the date is what?

A. November 24, 1950.

Q. Is it not a fact that in that letter you were advised of his contemplated plan to open a paper-board mill?

A. Well, in that letter he said he might.

Q. Yes. Did you have any notice prior to November 24, 1950, that he might? [313]

* * * * *

A. Yes. About a month previous to that we knew that Mr. O'Reilly had some interest in a machine back East.

Q. (By Mr. Short): That would be in October, 1950, would it? A. Yes.

Q. Your statement on direct examination that the first conversation occurred immediately after

(Testimony of Lawson P. Turcotte.)

your discovery that he was contemplating the board mill in California is not quite correct, is it?

A. Well, that is correct, because although we knew that he might do this and do that, it came to our attention through a Dun & Bradstreet report that he was actively connected with this new company around that time.

Q. Around what time?

A. April or May, in there.

The Court: Of what year? Repeat it so it makes it more convenient to keep track of it.

Witness: 1951. [314]

Q. (By Mr. Short): Well, now, on your direct examination you testified that was in March of 1951. Are you now testifying it was in April or May of 1951?

A. It could have been March, yes.

Q. Do you recall your deposition was taken at the company's plant in Bellingham on March 5, 1954?

A. Yes, sir. [315]

* * * * *

Q. Are you on page 51 now, Mr. Turcotte?

A. Yes.

Q. I am reading from line 7: "Question: You did? Answer: Yes, sir. Question: Now when did you yourself first converse with him during the course of which a separation date was specifically discussed by you and by him? Answer: I would say in the month of July sometime."

Do you recall that answer?

A. Yes.

(Testimony of Lawson P. Turcotte.)

Q. (Reading) "Question: Of what year? Answer: 1951."

Was that your answer? A. Yes.

Q. Do you now have any specific recollection of what the date of that conversation was? [316]

A. Well, this is the official conversation I had with Mr. O'Reilly after receiving his letter. I had had two or three conversations with him before that.

Q. You appreciate that that question was: "Now when did you yourself first converse with him * * * ." Do you see that question on line 9 of page 51?

A. Well, this answer would be wrong then.

Q. The answer in the deposition would be wrong?

A. That is correct, unless I misunderstood the question and thought that they were talking about the official conversation I had with him after his letter of July 12th.

The Court: Well, look at the surroundings sufficiently to see if anything occurs to you by which you were allowed to be not fully aware of the relationships so that you can let the Court now know for sure and finally which is the fact that is under inquiry as to the detail that is under inquiry, if you can. Any of us may be mistaken, of course, at any moment of our reflection on past events, but see if you cannot straighten it out.

Witness: Well, I think, Your Honor, on the top

(Testimony of Lawson P. Turcotte.)

of page 51 I probably misinterpreted the question. It said:

“Well, did you ever have any conversations with Mr. O'Reilly in 1951 with regard to a separation date, [317] as to when he was to leave the Company, or leave his employment with the Puget Company?”

Mr. Short: What page are you on?

Witness: At the bottom of page 50.

My answer was: “Yes. We had a conversation with him as to separation date and settlement. Not a separation date alone.”

Now, the answer to that was the only time we discussed separation date and settlement, was after the July 12 letter. Previous to that, we had only discussed separation date, and I probably——

The Court: (Interposing) Could a discussion on separation date have occurred as early as you there say on page 51 of your deposition?

Witness: It was before that.

Q. (By Mr. Short): Before July of '51?

A. Before July of '51, yes.

Q. Mr. O'Reilly—excuse me—Mr. Turcotte, the next succeeding question after the one you just read: Question: I am asking you first whether you had any conversation with him with reference to a separation date? Answer: We did,—I did.”

Is that correct? [318] A. Yes, yes.

Q. (Reading) “Question: You did. Answer: Yes, sir. Question: Now when did you yourself first converse with him during the course of which

(Testimony of Lawson P. Turcotte.)

a separation date was specifically discussed by you and by him? Answer: I would say in the month of July sometime."

Is that right? A. That is right.

Q. (Reading) "Question: Of what year?"

A. The answer is wrong.

Q. Very well. If I understand your testimony on direct examination correctly, in the conversation that you did have with Mr. O'Reilly you stated that you pointed out to him how much money had been paid him in commissions up until that time, is that correct? A. Yes.

The Court: What dates are you referring to, for my convenience, Mr. Short? What date is this you are referring to in the last question?

Mr. Short: The new correct date of—what is it, April of 1951?

Witness: No. I didn't understand the question that way, no. The amounts of commissions were talked about with Mr. O'Reilly in the latter part of July meeting. [319]

Mr. Short: I think I can clarify this.

The Court: Go ahead.

Q. (By Mr. Short): The conversation which you related on your direct examination in which you outlined to Mr. O'Reilly how much commissions he had drawn, that conversation took place shortly after July 12, 1951, is that correct? A. Yes.

The Court: May I interrupt you?

After July 12, when did you next talk with him about termination?

(Testimony of Lawson P. Turcotte.)

Witness: Well, I don't know the exact date, Your Honor. It would probably be around the 20th or 25th, in there, the latter part of July 1951.

The Court: All right. Now, after that, when again did you talk with him about termination of his connections with the company?

Witness: Never.

The Court: There was one time in your direct examination a little while ago when you, I thought, referred to some consideration that you gave in a conversation with him to his communication of a November date, and I failed to make note at the time of the date of that communication to which you then referred. Do you think of any letter that you [320] had from him or that your company had from him which you considered, which letter had a November date, and had a "1" in either the date of the month or the date of the year in it? I invite your attention to all the defendants' exhibits.

Let him have all the defendants' exhibits.

(Whereupon all of the defendants' exhibits are handed to the witness by the bailiff.)

Witness: Well, Your Honor, there was one date in November in which he asked for his commission checks.

The Court: What date in November, if you recall the date.

Witness: Well, it is November 1951, in which he asked for his commission checks.

The Court: Do you think the year would be 1951?

(Testimony of Lawson P. Turcotte.)

Mr. Short: That would be Exhibit A-2, if the Court please.

Witness: It is November 21.

The Court: Was that November 21, 1951?

Witness: Yes, sir.

The Court: What exhibit number is that?

Witness: A-2, Your Honor.

The Court: Now, Mr. Short, you may resume the examination. [321]

Q. (By Mr. Short): Mr. Turcotte, referring you now to your conversation that you testified to on direct that occurred shortly after the letter of July 12, 1951, which you received from Mr. O'Reilly, when you pointed out to him the total amount of commissions he had been paid by the company, what was the amount of that figure?

A. Something around \$90,000.00.

Q. You then later made a reference that you had therefore paid some \$180,000.00 over the four and one-half years approximately? A. Yes.

Q. Where was the other \$90,000.00 that you had reference to?

A. That was the \$130,000.00 that we paid him for his stock over and above his investment of \$50,000.00.

Q. You mean \$85,000.00 over and above?

A. Yes, plus his commissions.

Q. And you indicated to him—I think you testified—that he was therefore receiving more than the president of the company?

A. Well, I made it facetiously, yes.

(Testimony of Lawson P. Turcotte.)

Q. At that time who was president of the company? A. I was.

Q. On January 1, 1949, who was the president of the [322] company?

A. Mr. Fred G. Stevenot of San Francisco.

Q. During the calendar year of 1948, can you now state whether or not Mr. O'Reilly made more money on his three percent commission basis than Mr. Stevenot had in that same year?

Mr. Evans: Objected to as being immaterial and irrelevant, Your Honor.

The Court: The objection is overruled. There has been something said about more money in commissions paid to Mr. O'Reilly than the president's salary I think somewhere in the case. The objection is overruled.

Q. (By Mr. Short): Can you answer that?

A. I don't think I said just——

The Court: Just answer the question.

Q. (By Mr. Short): Can you state whether or not in 1948 Mr. O'Reilly was paid more in commissions than the remuneration paid to the then president of Puget Sound Pulp and Timber?

A. In commissions?

Q. Yes.

A. I don't know what his commissions were in '48.

Q. If I were to advise you that his commissions for [323] 1948 were \$31,564.62, would you then be able to answer the question?

(Testimony of Lawson P. Turcotte.)

A. It would be very close to it, if not—just in that neighborhood, yes.

Q. Well, do you know? Do you now know what the salary of the president of Puget Sound Pulp and Timber Company in 1948 was?

A. I could get it, but I believe it was around \$30,000.00.

The Court: What was that president's name?

Witness: Stevenot, S-t-e-v-e-n-o-t.

The Court: What is the history of this company? Is there any Canadian or Quebec capital in it?

Witness: No. It is all American capital.

The Court: Where was the company first formed?

Witness: It is all Pacific Northwest capital.

The Court: Was there some particular training that you had had previous to becoming connected with the company that recommended you to the pulp and paper industry?

Witness: Well, to explain that, Your Honor, I started out as a male stenographer, and I have been there for thirty years.

The Court: Where?

Witness: The pulp mill here. [324]

The Court: Where?

Witness: Here.

The Court: But you were with the timber industry before that you said—in accounting.

Witness: Yes.

(Testimony of Lawson P. Turcotte.)

The Court: Was any of that in the Canadian West or Northwest?

Witness: In the Canadian West?

The Court: In Vancouver Island?

Witness: No, it was in Alberta.

The Court: You may inquire.

Q. (By Mr. Short): Mr. Turcotte, you made reference in your direct examination to the fact that in a conversation with Mr. O'Reilly the five year period of his contract was under discussion. Do you have in your hand Exhibit 1? A. Yes, sir.

Q. Are you a signer of that exhibit?

A. Yes.

Q. Will you make reference to paragraph (8) of that Plaintiff's Exhibit 1? Does that paragraph make reference to the five year term?

A. Yes.

Q. And that five year term commences with what date? Would you read paragraph (8) aloud?

A. (Reading) "Bellingham Paper Products Company, when organized, shall enter into a five-year agency agreement with second party (the agency to run from the beginning of manufacture in said mill) * * * ."

Q. All right. Then the five year term to which you had reference commenced with the production in the board mill, did it not? A. Yes.

Q. And that date do you now recall?

A. May 1947.

Q. So that the five year term referred to would expire in May 1952, would it not? A. Right.

(Testimony of Lawson P. Turcotte.)

Q. Mr. Turcotte, if I understand the situation correctly, although you participated in the termination of Mr. O'Reilly's employment with the Puget Sound Pulp and Timber Company, you did not participate in any discussion in reference to his reduction of commissions from three to one and one-half percent? A. That is right.

Q. That was with Mr. Roberg, was it not?

A. That is right.

Q. However, you were at all times in attendance and an executive officer of the mill in 1948 and 1949 and ever since that date, have you not? [326]

A. That is right, yes.

Q. During 1949, did Mr. O'Reilly have any different or other or lesser duties in 1949 and subsequent thereto than he had had in 1948 and the portion of 1947 during which the board mill was in production? A. No.

The Court: Will you state, if you know, what the company did, if anything, it would not otherwise have done but for Mr. O'Reilly's voluntarily reducing the amount of his commission?

Witness: I don't think, Your Honor, it would have done anything differently excepting that at that time, after the Bellingham Paper Products was dissolved, we tried to give the paperboard plant more help from the operators of the mill.

The Court: Did that cost the defendant company anything? Plant working time?

Witness: Plant work time, yes. No, I don't think—well, I couldn't tell you what we would have

(Testimony of Lawson P. Turcotte.)

done had Mr. O'Reilly not voluntarily reduced his commission. It is a hard thing to——

The Court: Did you know of any business problems that were arising in that part of the business which related to paperboard and the paperboard division?

Witness: Oh, yes. I was entirely familiar with the operation. [327]

The Court: Describe what you knew to be the difficulties that were confronting that phase of the business that you think contributed to the result of Mr. O'Reilly's voluntarily reducing his commission to one and one-half percent?

Witness: Well, it was a question of the monthly financial results of the company which were not favorable.

The Court: It was not making enough profit?

Witness: It was not making any, and Mr. O'Reilly admitted that and voluntarily reduced his commissions.

Q. (By Mr. Short): Well, that is a hearsay statement by you. He didn't say that to you, did he?

A. Well, he didn't say that to me, no. I think it is in writing.

The Court: If you offer it as an objection, the objection will be overruled. I think he is president of the company and has a right to know what other persons subordinate in authority to him knew regarding the affairs of the company if such affairs

(Testimony of Lawson P. Turcotte.)

came under his jurisdiction when he was the superior corporate officer of Mr. O'Reilly.

Did you wish to ask him any further questions?

Mr. Short: Yes, I did.

Q. (By Mr. Short): Mr. Turcotte, you have just testified that in 1948 the paperboard division was losing money, is that correct? A. Yes.

Q. At that time, that is during the entire calendar year of 1948, the pulp company was billing out—that is as an accounting procedure—billing out pulp to that division, to the paperboard division, at its average sales price to other customers outside the company, was it not?

A. I think that is right. [329]

* * * * *

Q. At any time was it ever the practice as to any division other than the paperboard division to bill out any item at a figure greater than its cost to the company?

* * * * *

A. Answering that question, in the alcohol division we wouldn't know what to charge for its raw material because it is waste liquor that was formerly dumped in the Bay. We charge them for steam, labor, and everything else, but the raw material itself. It formerly went down the sewer, so we don't know what value it had.

On the lignisite division, that is a by-product after the sugars are taken out for alcohol. That is just another waste that we wouldn't know just what to charge or credit the alcohol plant. It is just run

(Testimony of Lawson P. Turcotte.)

through the alcohol plant and then it is run through the lignisite division, and we charge them for steam, electric power, labor, [331] depreciation, and a portion of the overhead.

Q. That is purely for the purpose of arriving at a profit and loss statement for each of those divisions, is it not? Otherwise, there would be no purpose in arriving at any figure?

A. That is right.

Q. Was there any particular purpose in charging the paperboard division any amount more than the cost?

A. Absolutely. That was the way we would learn whether we would make a profit on the board division or not having it and selling the pulp.

Q. Yes. In other words, that would indicate to you whether it would be better to sell that pulp to an outside customer at that average price rather than to make paperboard with it and sell the finished product? A. Yes.

Q. Do you know now whether you now so bill pulp to that division.

A. Not now, because it is all in one company now.

Q. It was all in one company in 1948.

A. But we do make computations every month separately to see how it is doing, based on as if we sold the pulp in the outside market. Those computations are made every month.

Q. And that is simply an internal accounting

(Testimony of Lawson P. Turcotte.)

system to keep you advised as to whether or not it is profitable to [332] maintain that division?

A. That is correct.

Q. Or to sell the pulp elsewhere?

A. That is correct.

Q. Mr. Turcotte, when you were in the habit in 1948 of billing to the division of pulp at average market, the fact that that resulted in a loss in that division did not necessarily mean you were losing money from the operation of that division but that it may mean you were making less money than had you sold the pulp directly, is that correct?

A. That is correct, yes.

Q. So it really makes no difference to the net profit of Puget Sound Pulp and Timber Company which way you bill it out, does it?

A. It certainly does.

Q. No. It makes a difference whether you are operating the board mill, but it makes no difference to the net profit of the company whether you use the one accounting system or the other?

A. Not presently, no.

Q. And it made no difference to the sales volume of that division which accounting system you used?

A. Not a bit.

Q. Now, you have Exhibit 1, do you, in your hand? May I refer you to paragraph (2)? Excuse me. In reference to [333] paragraph (8), the commissions paragraph which you previously read, the profit position under each or either of the accounting methods you have just described is unrelated

(Testimony of Lawson P. Turcotte.)

to that, the commission which Mr. O'Reilly would receive?

A. It is unrelated as to the amount of commission he would receive. That is right.

Q. One other matter. Can you tell the Court now whether or not in the period between mid-September 1951 and up to March 1, 1952, whether the sales of the paperboard division increased or decreased, do you know?

A. No, I don't know.

Q. Can you state whether or not in 1951, during a portion of which year I understand you have stated that Mr. O'Reilly was gone, did the sales of the paperboard division increase or decrease over the previous year of 1950?

A. Well, the answer to that would be that I think we ran the plant pretty full all through that period.

Q. Your answer would be that it increased?

A. About the same. [334]

* * * * *

Further Direct Examination

Q. (By Mr. Evans): Mr. Turcotte, will you state whether or not you were aware that Mr. O'Reilly was going back to Ottawa, Canada, for the purpose of buying a new machine?

A. No, I was not.

Q. Will you state whether or not such trip was authorized by your or any other officer to your knowledge? A. It was not.

(Testimony of Lawson P. Turcotte.)

Q. Do you know whether or not the company paid for his trip?

A. I believe we did. [335]

* * * * *

RUSSELL deLOPEZ

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Evans): Where are you presently employed?

A. Puget Sound Pulp and Timber Company, Bellingham, Washington. [337]

Q. In what capacity?

A. Traffic manager and assistant to the vice president.

Q. Will you state what are the nature of your duties?

A. As assistant to the vice president, I have charge of the sales division and seeing that it functions properly in relation to all of the invoicing, order execution, and related matters.

In relation to traffic work, I process new rates, take care of routing, ship bookings, and all related matters.

* * * * *

Q. Now, will you state whether or not at any time you have performed the duties of sales manager for the board division of the Puget Sound Pulp and Timber Company?

(Testimony of Russell deLopez.)

A. Yes, from September 1, 1951, until January 1, 1954.

Q. Will you state whether or not you recall the date that Mr. O'Reilly left Puget Sound Pulp and Timber Company?

A. It was either September 4 or 5, 1951.

Q. Will you state whether or not you were with him a substantial portion of his last day?

A. I was. [338]

Q. What was he doing during that time?

A. He was bundling up files and packing them in boxes, and after he got through with that he and I sat down and had a long conversation about all of the accounts of the paperboard division, starting with the Canadian border and going clear down to California. I made voluminous notes of all the things he told me, and I made a written report to Mr. Turcotte and Mr. Roberg.

Q. What was the purpose of that conversation?

A. He give me a brief resume of what the situation was in the paperboard division so I could take over the work.

Q. Now, will you state whether or not at any time thereafter for the next year you ever again saw Mr. O'Reilly around the premises of the Puget Sound Pulp and Timber Company?

A. Not to my recollection.

Q. Will you state whether or not you communicated with him during the next year at any time?

A. I think on one occasion I had reason to telephone him at Richmond, California, and ask him a

(Testimony of Russell deLopez.)

question, and to the best of my knowledge that is the only time that I had any communication with him in relation to company business.

* * * * * [339]

Q. Will you state whether or not, after Mr. O'Reilly left, you communicated with the customers of Puget Sound with regard to their needs?

Mr. Short: That will be objected to as immaterial, what this witness did.

The Court: The objection is overruled.

A. I did. I talked to them by telephone and I wrote them letters.

Q. Will you state whether or not, after Mr. O'Reilly departed, you serviced the accounts of the board division of the Puget Sound Pulp and Timber Company?

A. I most certainly did.

Q. Will you state whether or not the California Paperboard Company was a competitor of the board division of the Puget Sound Pulp and Timber Company?

Mr. Short: I object to the qualification of [340] this witness and the relevance and materiality of the question and that it calls for a conclusion.

The Court: Overruled.

A. They were in direct competition with us in certain grades.

Q. Will you state whether or not there was any occasion which arose where it was contemplated that it might be necessary to close down the board division of Puget Sound Pulp and Timber Com-

(Testimony of Russell deLopez.)

pany during the period September 1, 1951, through the month of February 1952?

A. Yes. The order situation got very drastic along in January 1952, and if we had not been able to close a 550 ton order for South Africa, I feel sure we would have had to close the mill for a period.

Q. Will you state who procured the order from South Africa?

A. Mr. Roberg negotiated it, and so did I.

Q. Will you state whether or not Mr. O'Reilly had any part in that order?

A. He didn't know anything about it.

Mr. Short: Objected to as not responsive.

The Court: That is sustained.

Mr. Short: And move it be stricken.

The Court: The Court will disregard the answer.

* * * * * [341]

A. None whatever.

The Court: How many ton order?

Witness: 550. That is almost half the production of the mill for one month, and February was a short month.

* * * * *

Cross Examination

Q. (By Mr. Short): You have been here through the trial, Mr. deLopez? A. Yes.

Q. You have heard the testimony in reference to what has been called an evergreen contract?

A. Yes, I have.

Q. You are acquainted with those as used by the Puget Sound Pulp and Timber Company?

(Testimony of Russell deLopez.)

A. I never heard the expression until today.

Q. Do you know of such contracts?

A. No, I do not.

Q. Do you know whether or not when you assumed your duties with the board division that there were such contracts in your files?

A. There was one contract to my recollection, but I haven't been able to find it. That was the only one that was signed.

Q. Whether or not there were any such signed contracts, were there such arrangements with the customers of Puget Sound Pulp and Timber paper-board division?

Mr. Evans: I am going to object to this line of questioning, Your Honor, as not being within the scope of the direct, and I believe it is a legal matter. "Arrangements" cover a multitude of sins, and we all know only a signed contract is binding.

The Court: What is there about the direct examination which inspires this?

Mr. Short: Well, he was asked on his direct examination if on September 1, 1951, he handled the sales for that division, and this question is designed to show that the sales are repeated by the customer under the evergreen system put in operation by Mr. O'Reilly.

The Court: The objection is overruled. [343]

Read the question.

(Whereupon the last question is read by the court reporter as follows: "Q. Whether or not there were any such signed contracts, were

(Testimony of Russell deLopez.)

there such arrangements with the customers of Puget Sound Pulp and Timber paperboard division?"")

A. I don't know whether there were are not.

Q. (By Mr. Short): In the latter part of 1951, from September on, what customers of Puget Sound Pulp and Timber board division did you service, as you call it?

A. Well, all of them. There was nobody else to do it.

The Court: How long have you been with the company, Mr. deLopez?

Witness: Since 1929.

The Court: In what various capacities?

Witness: I started out as secretary to the president of the company in 1929, and that was down in Everett, and I was transferred to Bellingham March 14, 1934, and I became assistant traffic manager of the company in 1937. I was in that capacity until 1942 when I became traffic manager. All that time I have been closely associated with Mr. Roberg in sales work.

* * * * * [344]

Q. If I understand your testimony, you indicated that you became sales manager in September 1951, is that correct?

A. Those were my duties.

Q. Of the board division?

A. Those were my duties.

Q. Was there another manager, other than a sales manager of that division?

(Testimony of Russell deLopez.)

A. No, there was not.

Q. Well, who ran the operation of the machines in the mill?

A. The plant superintendent.

* * * * * [345]

Q. You wouldn't know then how to figure grades or other technical matters for the operation?

A. I learned it as I went along.

Q. When did you become acquainted with that?

A. During those first few months. I am still not a production man. That wasn't part of my duty.

Q. You referred, Mr. deLopez, to a competitor, a company being a direct competitor of Puget Sound Pulp and Timber paperboard division. What is the name of that company you had reference to?

A. At that time California Paperboard Company.

Q. And is that the company that the testimony has concerned itself with as being the company Mr. O'Reilly founded in Richmond, California?

A. That is correct.

Q. When did that company become a competitor of Puget Sound Pulp and Timber Company?

A. To the best of my recollection some time in 1952.

Q. It wasn't in production until that time, was it?

A. I don't know the date they started production.

* * * * * [346]

(Testimony of Russell deLopez.)

Redirect Examination

Q. (By Mr. Evans): Mr. deLopez, will you state whether or not you advised the customers of Puget Sound that Mr. O'Reilly was no longer working for them? A. I did.

Q. And in particular, will you state whether or not you advised the Laminated Paper Products Company of such fact after September 1, 1951?

A. I did.

Mr. Short: That is objected to as self-serving, if the Court please.

The Court: That objection is overruled.

* * * * * [347]

Q. Will you state whether or not your plant superintendent of the board division was an experienced man or an inexperienced man?

A. Very experienced.

Q. Will you state whether or not, so far as having a man to run the plant is concerned, you were in any way handicapped by Mr. O'Reilly's leaving?

A. None whatever.

* * * * *

Q. Will you state whether or not you advised the people at the Salinas Wax Paper Company shortly after September 1, 1951, that Mr. O'Reilly was no longer connected with your company?

A. I did.

* * * * *

Recross Examination

Q. (By Mr. Short): How did you advise these people?

(Testimony of Russell deLopez.)

A. I don't recall whether it was by letter or by telephone, perhaps both.

Q. Have you examined your files to determine whether it was by letter or by phone? [348]

A. I have examined some of the files and some indicate there are letters.

* * * * *

Q. (By Mr. Short): You indicated that in reference to this 550 ton order that had it not been for that it would be likely you or some one would close the board mill. Isn't it a fact that at approximately the time that order was acquired that another customer of Puget Sound Pulp and Timber paperboard division, namely, the Gympsum, Lime and Alabastine Company, had ceased or diminished its orders to the paperboard division?

A. Not at that time, I don't believe.

Q. They customarily used approximately 450 tons a month, did they not?

A. I believe that was correct.

Q. And in the early part of 1952 or the latter part of 1951 they quit ordering at that rate, did they not?

A. I have not definite recollection, but you may be right. [349]

Q. Well, to what do you attribute the necessity of that one large order to keep that mill in operation at that particular time?

A. Well, if you are correct, the Gympsum, Lime and Alabastine quit ordering from us at the rate of

(Testimony of Russell deLopez.)

450 tons a month, and we had to find another customer to take its place.

Q. That would be a serious blow?

A. Yes, it would.

Q. Do you know whether or not the business of the Gypsum, Lime and Alabastine Company fell off markedly at that time?

A. I can't recall the exact time now, but I know there was one time when they were badly handicapped by a building strike in Canada.

Q. With reference to that customer that I just referred to, were sales commissions paid to any person for those Canadian shipments?

A. Well, Mr. O'Reilly collected commissions.

Q. No. I meant any other person outside of Puget Sound Pulp and Timber.

A. Oh, no. [350]

* * * * *

Further Redirect Examination

Q. (By Mr. Evans): Mr. deLopez, you are being handed what has been marked for identification as Defendants' Exhibit A-14. Will you state whether or not you can identify it without revealing what it is? A. Yes, I can.

Q. Will you state whether or not it is a copy of a letter which you transmitted in the regular and usual course of your business? A. It is.

Q. Will you state whether or not that came out of your files and records kept in the regular and usual course of business? A. It did.

Q. Will you state whether or not it is a perma-

(Testimony of Russell deLopez.)

nent record of your company with the Laminated Paper Products Company, a permanent record of your correspondence with them? [351]

A. It is.

Mr. Evans: I offer Exhibit A-14.

Mr. Short: No objection.

The Court: Admitted.

* * * * *

Further Recross Examination

Q. (By Mr. Short): That is the only one you can find, is that correct?

A. There were many letters like that, not to that particular company but to many companies.

Q. How did you happen to bring that one?

A. Because I heard the testimony this morning that Mr. Frankl of Laminated Paper Products said he did business only with Mr. O'Reilly, and he couldn't have because I was handling the work at the mill. [352]

* * * * *

CLAYTON E. ROGERS

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Evans): By whom are you employed?

A. Puget Sound Pulp and Timber Company.

Q. In what capacity?

A. Treasurer.

(Testimony of Clayton E. Rogers.)

Q. How long have you been employed in that capacity? A. Since April of 1953.

Q. What was your position prior to that time?

A. Chief accountant.

Q. For whom?

A. Puget Sound Pulp and Timber Company.

Q. How long have you been with the Puget Sound Pulp and Timber Company?

A. Since May 1, 1943. [353]

Q. Will you state whether or not you were acquainted with the plaintiff, Mr. Joe O'Reilly?

A. Yes, I was.

Q. Will you state whether or not at any time Mr. O'Reilly advised you of any agreement he had made to reduce his sales commission?

* * * * *

A. Yes.

Q. (By Mr. Evans): Will you state to the best of your recollection about when that conversation took place?

A. It would be a few days subsequent to the memorandum that I received in the official channels from Mr. Roberg. That memorandum is dated January 28, 1949.

Q. Do you recall where your conversation with Mr. O'Reilly took place?

A. It was either in his office or my office.

Q. Where was his office? [354]

A. On the second floor of the executive office building of the Puget Sound Pulp and Timber Company.

(Testimony of Clayton E. Rogers.)

Q. Will you state whether or not any other persons occupy that whole building other than Puget Sound's force or staff?

A. No, just Puget Sound staff.

Q. Now, will you state whether or not anyone else was present during this conversation?

A. Not to my recollection.

Q. Will you advise us what Mr. O'Reilly told you as to his agreement with regards to reduction of the sales commission?

A. He confirmed that the reduction of sales commission to one and one-half percent, as I had been notified by Mr. Roberg, was correct.

Q. Now, will you state whether or not at any time you heard from any source that Mr. O'Reilly in fact claimed he was entitled to an additional one and one-half percent? A. No.

Q. Now, will you state whether or not you recall about the time Mr. O'Reilly left Puget Sound Pulp and Timber Company?

A. About September 1st.

Q. Of what year? A. 1951. [355]

Q. Will you state whether or not you ever again saw him about the premises—say for the next year?

A. I do not recall seeing him there within the year.

Q. Will you state whether or not you ever received any communications from him between September 1, 1951, and the last day of February, 1952?

A. Yes, sir. I received a letter from him in

(Testimony of Clayton E. Rogers.)

response to a letter relative to some credit that I had written him shortly after September 1st.

Q. Did you have any communications with him in regard to anything other than payments or credits of moneys due? A. No, sir.

Q. Will you state whether or not you had any communications with him with regards to any work he might be doing for Puget Sound?

A. No, sir.

* * * * *

Q. (By Mr. Evans): You have been handed what has been admitted in evidence for a limited purpose as Exhibit A-10. Will you state whether or not you can identify it?

A. Yes, I can. [356]

Q. Will you state what it is?

A. It is a memorandum dated January 28, 1949, and addressed to me with notification from Mr. Roberg that in accordance with an agreement with Mr. O'Reilly the commissions for the sales in the board division were being reduced to one and one-half percent from three percent.

Q. Will you state whether or not that memorandum was received by you in the regular and usual course of business of the Puget Sound Pulp and Timber Company? A. Yes. [357]

* * * * *

JOE A. O'REILLY

called as a rebuttal witness on his own behalf, having been previously sworn, was examined and testified as follows:

(Testimony of Joe A. O'Reilly.)

Direct Examination

Q. (By Mr. Short): Mr. O'Reilly, are you acquainted with the customer of Puget Sound Pulp and Timber Company known as Gypsum, Lime and Alabastine Company? A. Yes, I am.

Q. Where is that concern located?

A. The main office is in Vancouver, British Columbia, and the plant in this area is New Westminster, British Columbia. I should say the Western office. The main office I think is in the Eastern part of Canada.

Q. What is their purpose? What do they produce?

A. They produce gypsum wallboard, which is lined with paperboard.

The Court: You mean the outside is covered with paperboard?

Witness: Yes.

Q. (By Mr. Short): During your tenure at Puget Sound Pulp and Timber Company, what did they purchase from that company? What [358] did they buy?

A. They bought the paper board that they use as the exterior liner of the gypsum wallboard.

Q. Up until mid-1951, what was the average tonnage shipped to this company?

A. Up until that time, as I recall it, it was approximately 300 tons a month, but they were asking for an increase of another 150, which would put them up to 450 tons per month.

* * * * *

(Testimony of Joe A. O'Reilly.)

Q. Do I understand that they had applied to Puget Sound Pulp and Timber for an increase of 150 tons a month?

A. They had been asking it over a period of months previous.

Q. All right. Now, did you have any contact with that company during a period subsequent to September 1, 1951?

A. I called there one time as I recall it.

Q. Do you recall when that would be? [359]

A. I am not certain of the date.

Q. Are you acquainted with the condition of their ordering from Puget Sound Pulp and Timber at the beginning of 1952?

A. I heard that their business had dropped off because of a building strike in that area and they couldn't take the tonnage that they had anticipated they would need. The result was that their orders dropped off for the paperboard division of the pulp mill.

Q. Do you have a recollection as to when that was?

A. I think it was in the first month or two of 1952. It could have started in the latter part of 1951. I am not certain.

Q. Did you ever have any contact with that company later in 1952 than February 29? A. No.

Q. Was there any time during your employment at Puget Sound Pulp and Timber Company in which the board mill was threatened with closure because of lack of orders?

(Testimony of Joe A. O'Reilly.)

A. There was a period I think in the early part of 1950 when business was not too brisk, and we tried an operation of five day weeks for, as I recall it, a two week period, but it didn't—in other words, the five day operation would eliminate certain overtime charges, and we thought that possibly by eliminating that we might have a [360] better profit for the five days than if we paid the extra charges and went the seven days, but it developed that that wasn't satisfactory, so we went back to seven days, which continued thereafter through all of the time that I was with them.

Q. How many hours a day does the mill operate? A. Twenty-four hours a day.

Q. Seven days a week?

A. Seven days a week.

Q. You heard the testimony of Mr. Turcotte?

A. Yes, I did.

Q. And you heard him relate the conversation between you and him in the latter part of July, 1951, did you not? A. Yes. [361]

* * * * *

Q. (By Mr. Short): State whether or not you had any conversation with Mr. Turcotte in the latter part of July 1951 as to your remuneration for the period you had worked in the board mill?

A. The rate of commissions was not mentioned during that period—that conversation I mean.

Q. Was there any conversation between you and Mr. [363] Turcotte as to the fact, if it was a fact,

(Testimony of Joe A. O'Reilly.)

that you had been paid up to that point some \$90,000.00 in commissions?

A. I don't recall that summary that Mr. Turcotte referred to.

Q. Was there any conversation reviewing the sale by you and the purchase from you by Puget Sound Pulp and Timber of your stock in Bellingham Paper Products Company?

A. I don't recall Mr. Turcotte mentioning that.

Q. Was there any conversation between Mr. Turcotte and yourself on that occasion in which you expressed to him your feeling that you had not been fairly treated?

A. Yes. I think that Mr. Turcotte's testimony supports that.

Q. Are you saying that Mr. Turcotte's testimony is correct insofar as it stated that there was a conversation as to whether or not you had been fairly treated?

Mr. Evans: Objected to as being leading.

The Court: That is sustained.

Q. (By Mr. Short): Will you relate then what conversation was had at that time in respect to the matter of your having been treated fairly or unfairly at that time? What was said by you and what was said by Mr. Turcotte?

A. I said several times to Mr. Turcotte that I felt that the separation on the basis that he prepared was not [364] being fair to me, and he said that he felt that it was.

Q. Separation as to what phase, what matter?

(Testimony of Joe A. O'Reilly.)

A. The termination date of February 29, 1952.

Q. And what date was his suggestion at the time you made this statement that it was unfair?

Mr. Evans: I am going to have to object again. He is going far beyond the rebuttal he said he was going to make. Now, Mr. O'Reilly has had an opportunity on direct examination to state what his conversations were. Now he is going back in and rehashing them all over again.

The Court: I am inclined to think so. The objection is sustained.

Q. (By Mr. Short): Well, will you state now whether at any time while the matter of your termination at Puget Sound Pulp and Timber Company was under discussion you made any agreement with Mr. Turcotte or any other officer of Puget Sound Pulp and Timber Company as to any other subject than the termination date of your services with the company?

Mr. Evans: Objected to as being part of the case in chief.

The Court: That objection is overruled.

A. I had no other conversation or subject of conversation other than the termination date with Mr. Turcotte or [365] any other officer of the company.

* * * * *

Cross Examination

Q. (By Mr. Evans): Do you have before you Exhibit A-2? A. Yes, I have.

(Testimony of Joe A. O'Reilly.)

Q. That is a letter written by you to Mr. Turcotte dated November 21, 1951?

A. It is two-thirds of a letter of that date.

Q. Will you read the second paragraph of that letter?

Mr. Short: I object to the reading as improper redirect examination. He has read it once before and has been examined thoroughly on it.

Mr. Evans: It is preparatory for the next question, Your Honor.

The Court: Read the exhibit silently.

Witness: (Peruses Defendants' Exhibit A-2.)

Q. (By Mr. Evans): Now, you have just testified that you did not at [366] any time agree with Mr. Turcotte or any other officer as to your compensation, isn't that correct, until your termination date?

A. Possibly I misunderstood the question. This one and one-half percent has been under discussion and recognized by everyone all the time. I meant anything other than that. That was the purpose of my answer, not to deny the figure of one and one-half percent.

Q. Well, then, you did, when you discussed with Mr. Turcotte the date of your termination, discuss your percentage rate of one and one-half, isn't that correct? A. Yes.

Q. So that what you just testified to here, that you did not discuss your percentage rate with Mr. Turcotte, is not true, is it?

A. I will explain that.

(Testimony of Joe A. O'Reilly.)

Q. Answer my question yes or no.

A. It is true with the qualification that I have already given you.

Q. It is true with the exception that it is not true, is that what you mean?

Mr. Short: I object to the form of the question.

The Court: That is argumentative. The objection is sustained. [367]

Q. (By Mr. Evans): Well, then, you now admit that you did discuss with Mr. Turcotte the fact that your percentage was to be one and one-half until your termination date?

A. Not in that manner.

Q. Then will you please explain why you wrote the letter of November 21 where you stated, as I recall: "Our agreement of one and one-half percent commission on board mill sales will be paid to me for six months starting September 1st"?

Mr. Short: I will object to the question as too wide.

The Court: Overruled.

A. That was a continuation rather than a starting point. It has been agreed and recognized by everyone concerned with it. I had no intention of denying this figure at any time.

Q. In other words, this confirms your agreement that you made with Mr. Turcotte that you were to receive one and one-half percent for an additional six months after September 1st, isn't that correct?

A. That is what we were talking about. [368]

* * * * *

(Testimony of Joe A. O'Reilly.)

Q. (By Mr. Evans): As I understand, on your rebuttal testimony you testified that you made a trip up to some place in Canada and you saw the Gypsum, Lime and Alabastine Company and that was between the period of September 1, 1951, and February 29, 1952, is that correct?

A. That is correct.

Q. And during that time you found out from talking with them that their orders were going to be substantially diminished, is that correct?

A. It was a threat at the time I talked to them, which later developed.

Q. Who paid for your trip up there?

A. I did. [369]

* * * * *

Q. But starting with January 1, 1949, from then on you had an expense account every month, didn't you?

A. Presumably so. There were items that I paid for at various times that weren't turned in.

Q. Now, when you discovered this information about the Gypsum, Lime and Alabastine troubles, perhaps they were going to cut out their orders, you made no report to Puget Sound about that, did you?

A. Puget Sound was aware of it through their conversations with the mill superintendent.

Q. In other words then, your trip up there to see that company was actually of no value to Puget Sound, was it?

A. It didn't result in any value to them.

(Testimony of Joe A. O'Reilly.)

Q. You didn't make any report of it so that they were aware of what you had done, that you had been there, what [370] information you found out?

A. As I stated, they were already aware of it.

Q. But you didn't make any report of it?

A. No, I did not.

Q. As I understand, it is your testimony here that all this time you were working for Puget Sound?

A. I didn't say that; I said a portion of the time.

Q. In other words, you were not doing any work for Puget Sound after September 1, were you?

A. I have already answered that question several times.

Mr. Evans: I ask that the witness be directed to answer the question.

The Court: Answer it again.

A. I was doing some work for them.

Q. Very limited, however, wasn't it?

A. I will admit it was limited. [371]

* * * * *

The Court: I can say to you that Defendants' A-1 to A-8 are admitted. They were admitted at the time they were first dealt with. A-9 has been admitted. I do not know of any exhibit that has been marked that has not been admitted, do you know, Mr. Clerk?

Clerk: No, Your Honor. All have been admitted according to my records now. [373] * * * * *

ORAL DECISION

The Court: In this case, from a preponderance of the evidence the Court is of the opinion and finds, concludes and decides as follows:

That this litigation has its background in a field of business enterprise having in it as leaders some of our nation's foremost, highest-minded, and most ethical businessmen, including Mr. Roberg and Mr. Turcotte of the defendant Puget Sound Pulp and Timber Company and others connected with that concern, and also including [375] the plaintiff in this case. It seems appropriate to comment, and to announce the Court's finding, in this further detail that I have heard a great many witnesses testify from the witness stand in this court, but I have never heard any one of them who impressed this Court more strongly by reason of their high sense of honor, business ethics, fair dealing, and common, every-day honesty than did the testimony of Mr. Roberg and Mr. Turcotte and the plaintiff Mr. O'Reilly.

We may wonder why men of such broad gauge as these would permit themselves to get into a dispute involving conditions, rights and obligations not admitted by them to be fully expressed in writing. We probably have here, however, about as good an example as we shall ever see of the high standard of mutual trust between businessmen like that between the old-fashioned Yankee businessmen. These men apparently dealt with each other in complete confidence among themselves that each would treat the other fairly not only in keeping with but

also wholly apart from their respective obligations and rights under written contracts.

However, nowadays it seems men worthy of that kind of trust and respect from each other are just as likely when they finally come to the parting of the ways to have a disagreement among themselves as are men motivated [376] by less high motives.

In this instance, these men, by coming into court, are doing nothing more than the average American citizen would do when dissatisfied with the conduct of another respecting their business relationship.

The plaintiff is looking to the law for relief, and neither the plaintiff nor the defendants in this action can be blamed or censured for submitting their contentions to this Court.

The plaintiff and this defendant company signed a written contract which is in evidence as Plaintiff's Exhibit 1, and that contract in paragraph (8) on page 3 thereof in writing stated, among other things, what the agency contract between them was to be in its terms, and the statement there in writing as to the contemplated agency contract terms, does not differ from the terms here proved by the evidence in this record.

You do not have to look any further for any written contract although it was contemplated that another future contract would be made. The detail as to what kind, however, is lacking concerning its form as being in writing or oral, but that written stipulation between these parties calls for the very same contract which the plaintiff contends became the contract of performance in this case. [377]

The plaintiff did not breach the conditions of paragraph (4) stated on the last sheet of paper contained in Plaintiff's Exhibit 3.

There was no valid accord and satisfaction entered into by and between these parties, because the defendant company neither did nor omitted to do any act or thing as to which it was not already obligated to do in consequence of any suggestion on plaintiff's part that he was in effect postponing the collection of one and one-half percent, in other words, one-half of his contracted commissions in this case. Nor did plaintiff thereafter lessen his efforts to perform his part of the agency contract.

The alleged accord and satisfaction is without any sufficient consideration in law necessary to make of it an accord and satisfaction with any legal effect.

The parties so far as accord and satisfaction and breach of contract by the plaintiff are concerned are left in the same position as they were in under and by virtue of the written contract in evidence as Plaintiff's Exhibit 1, and as explained by the unsigned writing in evidence as Plaintiff's Exhibit 3, which unsigned writing I understand from the evidence was treated by the parties on both sides in this litigation as the arrangement under which the parties operated in [378] pursuance of Plaintiff's Exhibit 1, although the parties did neither approve nor disapprove nor was it ever signed by the parties. Nevertheless, the Court must under the evidence accept it as an unsigned document properly admitted as evidence in this case and as binding on the parties.

The Court finds that plaintiff and defendants' predecessor in interest, Bellingham Paper Products Company, entered into a contract in writing whereby the defendant Puget Sound Pulp and Timber Company agreed to employ and to have employed the plaintiff as agent to sell the products of the paperboard mill of the Bellingham Paper Products Company for the period of five years commencing with the beginning of the manufacture of materials produced in the paperboard mill then to be erected by the Bellingham Paper Products Company on property leased from the defendant Puget Sound Pulp and Timber Company in Bellingham. Such sales agency was for the benefit of the plaintiff and Bellingham Paper Products Company, and later the rights and duties of the Bellingham Paper Products Company were transferred to and assumed by the defendant Puget Sound Pulp and Timber Company, which company is obligated in the place of Bellingham Paper Products Company in respect to all matters and things which originally were imposed [379] as duties and obligations upon such Bellingham Paper Products Company, and particularly is the defendant Puget Sound Pulp and Timber Company obligated to plaintiff in respect to the matters and things herein at issue.

The plaintiff did conform to all of the terms and conditions of said agency agreement; and the performance of such agency agreement became effective as of the month of May, 1947, and continued for the term thereof, namely, for five years thereafter.

The defendant wrongfully breached the terms and conditions of said agency contract which devolved originally upon the Bellingham Paper Products Company and were later transferred to an assumed by the defendant Puget Sound Pulp and Timber Company.

The plaintiff is entitled to recover off and from the defendant Puget Sound Pulp and Timber Company, a corporation, only in the total sum prayed for in plaintiff's first cause of action herein, namely, \$59,570.10.

Other issues in this case, if there are any to be determined, will be determined on the day when the Court will settle the Findings of Fact and Conclusions of Law and Judgment in this case.

Unless I am convinced later—and I am not ruling finally upon it now—that there is any kind of penalty [380] attached to the duties of the defendant, the Court would not be favorable to imposing any such penalty.

The successful party is entitled to receive at the Court's hands an award for taxable costs in addition to all other recoveries in this case.

The Court is considering continuing this case until August 15, 1955, for the purpose of settling and entering proper forms of Findings, Conclusions and Judgment, and I ask counsel to be here on that day at two o'clock in the afternoon.

I shall wish to have the opportunity of amending, correcting and in any way changing the expressions of the Court in connection with this orally an-

nounced decision, and I will not be able to give that attention until after this week. There will be some delay to counsel if anyone should ask for a transcript of the Court's oral decision. The decision is informally announced at this time primarily for the purpose of advising the litigants of the Court's decision, and it is not in any sense for the purpose of finally expressing the Court's reasons therefor.

Counsel and those connected with the case are excused until two o'clock in the afternoon on August 15th.

(At 12:15 o'clock, p.m., Monday, July 25, 1955, trial proceedings concluded.) [381]

* * * * *

[Endorsed]: Filed September 7, 1955.

[Endorsed]: No. 14906. United States Court of Appeals for the Ninth Circuit. Puget Sound Pulp and Timber Co., a corporation, and Lawson Turcotte, Appellants, vs. Joe A. O'Reilly, Appellee. Joe A. O'Reilly, Appellant, vs. Puget Sound Pulp and Timber Co., a corporation, and Lawson Turcotte, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: October 18, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14906

PUGET SOUND PULP AND TIMBER CO., a
corporation,

Appellant and Cross-Appellee,

vs.

JOE A. O'REILLY,

Appellee and Cross-Appellant.

APPELLANT'S STATEMENT OF POINTS

Comes Now the Appellant, Puget Sound Pulp and Timber Company and, pursuant to Rule 17(6), hereby states that it adopts the statement of points to be relied upon heretofore filed with the District Court and included as a part of the record on appeal submitted by the District Court to the Court of Appeals for the Ninth Circuit.

EVANS, McLAREN, LANE,

POWELL & BEEKS,

/s/ VAUGHN E. EVANS,

/s/ W. BYRON LANE,

Attorneys for Appellant, Puget
Sound Pulp and Timber Co.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 21, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION RE USE OF ORIGINAL
EXHIBITS ON APPEAL

It Is Hereby Agreed and Stipulated by and between counsel for all parties to this appeal that an order may be entered directing that the original Exhibits may be considered by the Court in their original form without the necessity of the same being reproduced and printed in the Record on Appeal.

EVANS, McLAREN, LANE,
POWELL & BEEK,

/s/ VAUGHN E. EVANS,

Attorneys for Appellant and Cross-Appellee, Puget
Sound Pulp & Timber Company

RUMMENS, GRIFFIN, SHORT &
CRESSMAN and
MAX BERNBAUM,

/s/ KENNETH P. SHORT,

Attorneys for Appellee and Cross-Appellant, Joe A.
O'Reilly

[Endorsed]: Filed Oct. 21, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEE CROSS-APPELLANT'S STATE-
MENT OF POINTS

Appellee Cross-Appellant, Joe A. O'Reilly, hereby adopts the statement of points to be relied upon which he has heretofore filed with the District Court and included as part of the record heretofore submitted to the court by the District Court.

RUMMENS, GRIFFIN, SHORT &
CRESSMAN and
MAX BERNBAUM,

/s/ KENNETH P. SHORT,

Attorneys for Appellee Cross-
Appellant Joe A. O'Reilly

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 27, 1955. Paul P. O'Brien,
Clerk.

No. 14906

IN THE
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Appellee.

JOE A. O'REILLY,

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vs.

PUGET SOUND PULP AND TIMBER
Co., a corporation,

Cross-Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

EVANS, McLAREN, LANE,
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VAUGHN E. EVANS
MARTIN P. DETELS, JR.,

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FILED

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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

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INDEX

| | <i>Page</i> |
|---|-------------|
| Statement of Jurisdiction..... | 1 |
| Statement of the Case..... | 2 |
| Questions Raised..... | 11 |
| Specifications of Error..... | 12 |
| Argument on Specification of Error No. 1..... | 14 |
| Summary of Argument..... | 14 |
| Appellee's Compensation Was Reduced..... | 14 |
| Argument on Specification of Error No. 2..... | 18 |
| Summary of Argument..... | 18 |
| The Contract Was Executory..... | 19 |
| No Fresh Consideration Is Required for a Binding Modification of an Executory Contract | 19 |
| Consideration Moved to the Appellee..... | 25 |
| Argument on Specification of Error No. 3..... | 27 |
| Summary of Argument..... | 27 |
| The Agreement of July, 1951, Constituted an Accord and Satisfaction of All Obligations Between the Parties..... | 27 |
| The Law of Accord and Satisfaction..... | 30 |
| Appellant Having Preformed Under the July, 1951, Agreement, Appellee Is Estopped from Repudiating that Agreement..... | 34 |
| Argument on Specification of Error No. 4..... | 40 |
| Summary of Argument..... | 40 |
| The Contract Was Not Signed..... | 40 |
| Partial Performance Does Not Take the Contract Out of the Statute of Frauds..... | 43 |
| Conclusion | 45 |

TABLE OF CASES

| | <i>Page</i> |
|--|-------------|
| Aall v. Riverside Irrigation Dist., 157 Wash. 442, 289 Pac. 22 (1930)..... | 41 |
| Abrams v. Astor, 170 F. (2d) 544 (2 Cir., 1948) .. | 25 |
| Austin v. Union Lumber Co., 95 Wash. 608, 164 Pac. 245 (1917)..... | 32 |
| Bond v. Wiegardt, 36 Wn. (2d) 41, 216 P. (2d) 196 (1950)..... | 31, 32 |
| Bowman v. Webster, 44 Wn. (2d) 667, 269 P. (2d) 960 (1954)..... | 38 |
| Boyd-Conlee Co. v. Gillingham, 44 Wn. (2d) 152, 266 P. (2d) 339 (1954)..... | 31 |
| Davidson v. Mackall-Paine Veneer Co., 149 Wash. 685, 271 Pac. 879 (1928)..... | 25, 26 |
| Douglas County Mem. Hospital Assn. v. Newby, 45 Wn. (2d) 784, 278 P. (2d) 330 (1954).... | 36, 37 |
| Fish Clearing House v. Melchoir, Armstrong Dessau Company, 174 Wash. 539, 25 P. (2d) 381 (1933)..... | 42 |
| Fuller v. Deacon, 172 Wash. 489, 30 P. (2d) 843 | 35, 36 |
| Graham v. N. Y. Life Ins. Co., 182 Wash. 612 47 P. (2d) 1029 (1935)..... | 31 |
| Hartsville Oil Mill v. United States, 271 U. S. 43, 70 L. Ed. 822..... | 24 |
| Hunter's Cattle Co. v. Carsten's Packing Co., 129 Wash. 377, 225 Pac. 68 (1924)..... | 21 |
| Inman v. Roche Fruit Co., 162 Wash. 235, 298 Pac. 342 (1931)..... | 22 |
| James v. Riverside Lbr. Co., 121 Wash. 130, 208 Pac. 260 (1922)..... | 30 |
| Johnson v. Peterson, 43 Wn. (2d) 816, 264 P. (2d) 237 (1953)..... | 36 |

TABLE OF CASES

| | <i>Page</i> |
|--|-------------|
| LaPlante v. Hubbard, 125 Wash. 621, 217 Pac. 20 (1923)..... | 19 |
| Mall Tool Co. v. Far West Equipment Co., 45 Wn. (2d) 158, 273 P. (2d) 652 (1954)..... | 38 |
| Meyer v. Strom, 37 Wn. (2d) 818, 226 P. (2d) 218 (1951)..... | 23, 36 |
| Mid-State Products Co. v. Commodity Credit Corp., 196 F. (2d) 416 (7 Cir. 1952)..... | 24, 25 |
| Nielsen v. Northern Equity Corp., 147 Wash. Dec. 155, 286 P. (2d) 1034 (1955)..... | 23 |
| Ragghiati v. Harris, 124 Cal. App. (2d) 17, 268 P. (2d) 45 (1954)..... | 45 |
| Reynolds v. Travelers Ins. Co., 176 Wash. 36, 28 P. (2d) 310 (1934)..... | 37 |
| Savage Arms Corp. v. United States, 266 U. S. 217, 69 L. Ed. 253..... | 24 |
| Union Savings & Trust Company v. Krumm, 88 Wash. 20, 152 Pac. 681 (1915)..... | 43, 44 |
| Vigelius v. Vigelius, 169 Wash. 190, 13 P. (2d) 425 (1932)..... | 34, 35, 37 |
| Western Timber Co. v. Kalama River Lbr. Co., 42 Wash. 622, 85 Pac. 338 (1906)..... | 41 |

TEXTS

| | <i>Page</i> |
|--|-------------|
| 22 A.L.R. 723, Annotation..... | 45 |
| 12 Am. Jur. 516, "Contracts," Sec. 19..... | 32 |
| 12 Am. Jur. 860, "Contracts," Sec. 305..... | 26 |
| 12 Am. Jur. 987, "Contracts," Sec. 408..... | 34 |
| 17 Corpus Juris 862-3, "Contracts," Sec. 376..... | 34 |
| 17 Corpus Juris 887, "Contracts," Sec. 398..... | 26 |
| 5 Fletcher Cyclopedia (1952 Rev. Vol.) Sec. 2206 | 41 |
| Restatement of Contracts, Sec. 32, pp. 40-41, Illustration 1..... | 26 |

STATUTES

Federal

| | |
|------------------------------|----|
| Title 28 USC, Sec. 1291..... | 2 |
| Title 28 USC, Sec. 1332..... | 2 |
| F. R. C. P., Rule 52..... | 17 |

Washington

| | |
|-------------------------|----|
| R. C. W. 19.36.010..... | 40 |
|-------------------------|----|

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PUGET SOUND PULP AND TIMBER
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UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

JURISDICTION

The complaint alleges (Tr. 3), and the evidence shows, that the appellant and the appellee are citizens of different states and the amount in controversy is in excess of \$3,000.00, exclusive of costs

and interest. The District Court so found (Tr. 35). Jurisdiction of the District Court is conferred in Section 1332 of Title 28 USC and jurisdiction of this court to hear this appeal is conferred in Section 1291 of Title 28 USC.

STATEMENT OF THE CASE

This is an action by Joe A. O'Reilly, appellee, to recover additional commissions claimed to be due him under an agency agreement with a predecessor corporation of the appellant, Puget Sound Pulp & Timber Co., which agreement was assumed by appellant. The complaint alleges an agreement to pay commissions at the rate of three per cent of net sales but that only one and one-half per cent was paid during the period in controversy, January, 1949, to February, 1952. (Tr. 3)

Appellant denied that appellee was entitled to commissions at the rate of three per cent for this period, and, alleged among other affirmative defenses, that the original agreement was modified in January, 1949; that the parties entered into an accord and satisfaction in July, 1951; that the appellee is estopped from claiming further compensation; and that the original agreement was void under the Washington Statute of Frauds. (Tr. 19)

In 1946 appellee owned a paperboard machine located in New York and desired to install it in a

mill in the Pacific Northwest (Tr. 67). For many years appellant owned and operated a mill in Bellingham, Washington, which produced paper pulp and a by-product called screenings (knots and residue not usable in pulp) suitable as raw materials for making paperboard (Tr. 87).

Appellee and appellant entered into an agreement (Ex. 1, Tr. 9) on May 22, 1946, whereby a corporation, with a capitalization of \$200,000.00, was to be formed, known as Bellingham Paper Products Company, (hereinafter called "Paper Products Company") with the appellee contributing his paperboard machine and \$2,000.00 in cash, for a total value of \$50,000.00, in payment of one-fourth of the capital stock, and appellant contributing \$150,000.00 in cash for the other three-fourths of the capital stock. (Tr. 57, 58) Said agreement contained a provision to the effect that when the corporation was formed, the Paper Products Company and the appellee would enter into a five-year agency agreement whereby appellee would sell the products of the new corporation and receive three per cent commission on net sales as payment for his services, together with reimbursement of certain expenses.

The corporation was formed, a building was constructed to house the paper machine on land owned by appellant adjacent to its pulp plant, and the plant went into production in May, 1947. (Tr. 77, 78) The

Paper Products Company and the appellee agreed upon the terms of an agency agreement and reduced the same to writing (Ex. 3, Tr. 15), which included the pencil insert attached thereto, but the agreement was never signed (Tr. 58) by either party. Although plaintiff's Exhibit 3 was not signed, both parties agree that the terms set forth therein are the terms agreed upon (Tr. 58, 59). As appellee had previously been engaged in the paperboard and carton business in Tacoma for some time prior to 1946 this contract provided:

"(4) Second party agrees to devote such time and effort to the making of said sales as shall be necessary to accomplish the same, and second party agrees to use due diligence and exercise the best of faith in carrying out and performing this contract. Second party further agrees that while this contract is in force and effect, he will not undertake or promote the sale or sales of like, similar, or competing commodities on behalf of any other company or person. Except those products which are manufactured and sold by him in plants in Tacoma, Wash., operated under the trade name of the Standard Carton Co." (Tr. 18)

The contract also provided:

"(2) * * *. Should second party breach this contract in any manner, or should his work in conducting the sales for the company prove inefficient and unsatisfactory to the Board of Directors of the Company, the Board shall at any time after two (2) years from the date the mill of the Company commences production have authority to terminate the agreement by paying second party all commissions then due and

payable to him and by tendering him in exchange for a transfer of any stock then owned by him in the Company, to the Company or its nominee, the amount invested by him therein at the rate of One Hundred Dollars (\$100) per share, plus any amount earned by the stock then owned by second party not theretofore paid second party in the form of dividends, it being the intention of this agreement that if any amount has been paid out of net earnings of the Company on account of its indebtedness or otherwise, that such sum so earned on second party's stock at the time of the cancellation of this agreement shall be paid to him; provided, it shall be optional with second party whether or not he accepts said tender and transfers his stock or whether he will retain the ownership of his said stock in the Company; provided further, that the refusal of second party of such tender shall not affect the cancellation of this contract, and nothing herein contained shall be construed as authorizing second party to voluntarily terminate this contract and claim the benefits of this paragraph.

"Nothing above set forth in this paragraph shall be construed as a limitation upon or as affecting the right of either the Company or second party to terminate and end this contract for willful or intentional breach thereof by the opposite party. * * *" (Tr. 16, 17)

The original contract (Ex. 1, Tr. 9) contained other provisions pertaining to the new corporation borrowing an additional sum of \$200,000.00 from a bank, to be used in constructing the paperboard mill, to be guaranteed by appellant and secured by a pledge of all the stock of the new company. This agreement also provided that appellant and the new corporation would enter into a lease agreement by

which the appellant would lease to the new corporation the land upon which the new plant would be built, would supply water, steam, power and electricity all at agreed figures. Such an agreement was later entered into. Also, a stock pledge agreement was entered into between the interested parties as contemplated and an option agreement which imposed restrictions upon the same and transfer by the parties to this action of their stock, with option to purchase to the party not selling.

Later in 1947 the appellant purchased the appellee's interest in Bellingham Paper Products Company for \$135,000.00 in cash (Tr. 58, 141, 142) and dissolved the new corporation in December, 1947, taking over its assets and operating its plant as the Paperboard Division of the appellant corporation. Appellant assumed and agreed to pay and perform all obligations of the dissolved corporation. The appellee continued to do the same work for the paperboard division as he had formerly performed for Paper Products Company and received three per cent of the net sales as commission until December 31, 1948 (Tr. 58, 59).

During the month of December, 1948, (appellee's version—January, 1949, appellant's version) the appellee *voluntarily* reduced his compensation from three per cent commission to one and one-half per cent commission. (Tr. 95, 109) A principal issue in

the case is as to the binding effect of this reduction. Appellee had a conversation with Mr. Roberg, Vice President of appellant corporation, who had general supervision over the Paperboard Division, in Mr. Roberg's office, wherein appellee stated to Mr. Roberg "*that the profits of the Paperboard Division were not very substantial*" and "*that as a temporary measure*" the appellee "*would reduce the compensation to one and one-half per cent until the operations became profitable.*" (Tr. 96, 97) Mr. Roberg accepted this proposal on behalf of the appellant. Appellee confirmed his voluntary reduction with Mr. Rogers, the Treasurer and chief accounting officer of appellant. (Tr. 276) The subject of this reduction was first raised by appellee. (Tr. 97) At this time the paperboard division was not making any money which appellee knew (Tr. 260) and which was the reason for the voluntary reduction. The appellee was paid three per cent commission through the month of December, 1948, and one and one-half per cent commission commencing January 1, 1949, through the month of February, 1952. (Ex. A-8)

In 1950 or early 1951 (Tr. 98, 249, 250) appellee purchased another paperboard machine in Canada on his own account and sought to persuade appellant to purchase the same from appellee and install it in the Paperboard Division, which appellant declined to do. (Tr. 98, 99) The appellee then organ-

ized a paperboard company on his own account, known as California Paperboard Company, and in early 1951, started constructing a plant at Richmond, California, to house the machine. (Tr. 100) This action amounted to a breach of the terms of his employment agreement (Ex. 3) This paperboard mill went into production in November, 1951 (Tr. 106) Appellant did not want appellee to represent its paperboard division and another competing board mill at the same time and negotiations were begun in the first quarter of 1951 to select a date for the termination of appellee's connection with appellant. (Tr. 98, 99, 100, 101, 228, 249, 267) Appellee suggested a termination date of December, 1952, and appellant desired a termination date of September 1, 1951 (Tr. 101, 102, 103, 228-238)

In pressing for his contention that the termination date should be December, 1952, appellee wrote a letter dated July 12, 1951, pointing out that he had previously voluntarily reduced his commission rate. (Ex. A-1) Thereafter appellee and Mr. Lawson Turcotte, President of appellant corporation, had a conference in which it was agreed that appellee's compensation would be terminated March 1, 1952. (Tr. 101) As to the other details of what was agreed upon at that conference there is a dispute in the evidence.

Mr. Turcotte's version is that it was agreed that

appellee's services would terminate as of September 1, 1951, but that appellee would continue to receive commissions until March 1, 1952, at the 1½% rate, in full payment and satisfaction for all of the appellant's obligations to the appellee. Appellee's version is that the only item agreed upon was that the date of termination would be March 1, 1952. (Tr. 101, 109-113, 234, 240)

The appellee moved his office from appellant's premises in early September of 1951 and was never seen again by the management of appellant organization until some time after March 1, 1952. (Tr. 218, 219, 243, 266, 277)

On September 21, 1951, appellee wrote to Mr. Turcotte, President of appellant as follows: (Ex. A-11)

"The Sales Commission check for August was received and I thank you for it.

"An item that has apparently been overlooked is the issuing of a check for my expenses during the month of June. This was quite an item as it covered the convention of the Pacific Coast Association at Victoria, B. C.

"There will be no expenses charged for August, or thereafter, but I would appreciate the check for June."

On November 21, 1951, appellee wrote a letter to appellant stating in part as follows: (Ex. A-2)

"Apparently your accounting department has overlooked sending me a commission check for September and October.

"As I recall our agreement, a figure of one and one-half per cent commission on Board Mill sales would be paid me for six months,

starting with the first of September."

Thereafter the appellee wrote a letter on April 7, 1952, stating in part: (Ex. A-3)

"Apparently your staff has overlooked sending me the commission check for February, we had agreed that this would be the last one."

The following day, April 8, 1952, appellant wrote the following letter over its president's signature: (Ex. A-4)

"Enclosed herewith is our check, together with statement covering sales in the Board Division for the month of February. This completes our commitment to you as previously agreed upon."

The check enclosed with that letter (Ex. A-5) was at the rate of $1\frac{1}{2}\%$ and was received and cashed by appellee.

Nothing further was heard from appellee by appellant until appellee's letter of June 5, 1953 (Ex. A-6), wherein appellee states in part:

"You may recall that I voluntarily suggested that I take one and one-half per cent or half the agreed amount starting January 1, 1949, *'until the operation became profitable'*."

In that letter, appellee, for the first time, makes demand for an additional one and one-half per cent commissions on all sales from January 1, 1949, through the month of February, 1952 (Tr. 110, 228-234, 277)

Appellee thereafter instituted this action seeking to recover an additional one and one-half per cent

commission on the net sales of the Board Division from January 1, 1949, to March 1, 1952. No evidence was presented to indicate that the Paperboard Division was ever a profitable operation.

The trial judge made a finding that the plaintiff did not mean what he testified to on page 97 of the transcript of the record but that he meant he would *postpone* the collection of the remaining one-half of his commissions. (Tr. 38)

QUESTIONS RAISED

1. When appellee testifies that he voluntarily agreed to reduce his commissions from three per cent to one and one-half per cent until the operations became profitable, is a finding by the trial judge, that such an agreement was only a temporary *postponement* of the collection of the remaining one and one-half per cent, clearly erroneous?

Trial Judge's answer—No.

2. Can two parties to an executory contract make a binding modification of that contract without fresh consideration?

Trial Judge's answer—No.

3. When two parties have entered into an agreement for the termination of a contract and the payor has paid the sum of money fixed for the termination of that contract, and the same has been accepted by the payee as full payment of that contract, can the

payee repudiate the agreement and sue for a greater amount?

Trial Judge's answer—The payee can.

4. When parties orally agree on the terms of a contract which by its terms cannot be performed within one year and reduce the same to writing but do not sign such contract, is that contract void under the Statute of Frauds of the State of Washington as one which is not to be performed within one year.

Trial Judge's answer—Such contract is not void under the Statute of Frauds of the State of Washington.

SPECIFICATIONS OF ERROR

1. The finding of the Trial Judge that the agreement of January 1949 was merely a postponement of the collection of one-half of appellee's commissions, as set forth in Finding X (Tr. 38) is clearly erroneous and not supported by any evidence whatever.

2. The findings and conclusions of the Trial Judge that the original agency agreement was not modified by the agreement of January, 1949, and that such modification was not binding on both parties are clearly erroneous (Findings of Fact Nos. X, XIII, XIV; Conclusions of Law Nos. II, IV), in that under the law of Washington fresh consideration

is not required for the binding modification of an executory contract, and further that appellee did receive consideration for the reduction of his commission.

3. The findings and conclusions of the Trial Judge that the agreement of July, 1951, by which appellee's employment was terminated, and his compensation was to cease as of February 29, 1952, did not constitute an accord and satisfaction of all matters arising out of his employment, and that appellee was not estopped, after performance thereof by appellant, from bringing suit on the original agency agreement, are clearly erroneous (Findings of Fact Nos. XI, XIII, XIV; Conclusions of Law Nos. II, III, IV) in that appellant desired to terminate his compensation at an earlier date, but was induced to continue his commission by appellee's representations as to his voluntary reduction therein, and his concealment of the fact that he claimed the right to additional compensation.

4. The finding and conclusion of the Trial Judge that appellant had failed to sustain its burden of proving its defense of the Statute of Frauds as to Exhibit 3 is clearly erroneous (Finding of Fact No. XIV; Conclusion of Law No. III), in that under the law of Washington a contract which, by its terms, may not be performed within one year, is void un-

less in writing and signed by the party sought to be charged.

5. The Trial Judge erred in entering judgment for appellee and against appellant, for the reason that said judgment is contrary to the law and the evidence, in the respects alleged in Specifications of Error 1 through 4 herein.

ARGUMENT ON SPECIFICATION OF ERROR NO. 1

Summary of Argument

The finding of the Trial Court that the appellee's proposal was to the effect that he would postpone the collection of one-half of his compensation was clearly erroneous and is not supported by an iota of evidence.

Appellee's Compensation Was Reduced

Finding of Fact No. X (Tr. 38) states, in part, as follows:

"That in December, 1948, or January, 1949, plaintiff, without consideration or promise of consideration, advised defendant Puget Sound Pulp & Timber Co. that he would temporarily reduce his commissions to one and one-half per cent of net sales of the Paperboard Division of defendant corporation, and would in effect, *postpone* collection of the remainder thereof." (emphasis supplied)

The trial judge thus created an entirely new and different agreement which was neither pleaded by the appellee nor contemplated by the parties.

Not an iota of evidence was introduced which would support the Trial Judge's finding.

The appellee, in answer to questions propounded by his own counsel, described the transaction as follows:

"Well, I said to Mr. Roberg that the profits of the board division weren't very substantial and I said that as a temporary measure I would reduce the commission to one and one-half per cent until the operations became profitable."
(Tr. 97)

On cross-examination the following testimony was given:

"Q. Then I believe you told us sometime in December of 1948 you voluntarily reduced your commission from three per cent to one and one-half, is that correct?

"A. I voluntarily suggested a temporary reduction of that amount at that time, yes." (Tr. 109)

In the appellee's letter of July 12, 1951 (Ex. A-1), he states:

"As you know I voluntarily reduced my sales commission from 3 per cent to one and one-half per cent in January of 1950."

The appellee, by oral testimony, stated that the year in above quotation from Exhibit A-1 was in error and that it should have been January 1, 1949.
(Tr. 123, 124)

On cross-examination the following question and answer appear on page 109:

"Q. On January 1, 1949, you were agreeable to receiving $1\frac{1}{2}\%$ commission — at least

for that month — rather than three per cent?

“A. Yes.”

If appellee had intended only to temporarily *postpone* the collection of one-half of his commissions he would not have so answered the foregoing question in the affirmative.

On page 111 we find the following statement by the appellee:

“Q. So that it is your recollection that the only conversation and the only understanding or agreement made was with Mr. Roberg?

“A. Mr. Roberg. I think that we talked about it. A matter of, oh, four to six months later I suggested that it might be increased. I didn't suggest all the way at that time, as I recall it. Nothing was done about it.”

If the appellee had only agreed to a postponement of the collection of his earnings he would not have suggested that his earnings be increased, and that by but a part of the difference between one and one-half and three per cent.

In the appellee's letter of June 5, 1953 (Ex. A-6) he states:

“You may recall that I voluntarily suggested that I take $1\frac{1}{2}\%$ or half of the agreed amount starting January 1, 1949, ‘*until the operation became profitable*’.”

“It is my considered opinion that your records, and/or an independent audit, will disclose the fact that the board mill operation was profitable for the major portion, if not all, of the time since that date.”

If the appellee had in fact only made an agree-

ment to *postpone* the collection of his commission he would not have been concerned about the period of time during which the operation was profitable. If he in fact believed he was entitled to the other one-half of his commission he would not have made the assertion that at least a portion of the time the operation was profitable.

Rule 52 of the Federal Rules of Civil Procedure provides:

“Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses.”

Appellant contends that the finding of the Trial Court is clearly erroneous. There is neither a suggestion nor a permissible inference, much less a preponderance of the evidence, that appellee's collection of one-half of his compensation was to be postponed or deferred. He himself did not so testify. No question of credibility is involved. The plain, simple English language used by the appellee in describing the agreement he made with the appellant discloses the clear error committed by the trial judge. The appellee simply stated his case, i.e. that the appellant should have restored his commissions to three per cent as soon as the operation became profitable. (Tr. 97, Ex. A-6) However, the appellee made no attempt whatever to present any evidence as to whether the operations ever became profitable. The

burden of proof was on the appellee to prove this fact if it were true. The books and records of appellant were available to the appellee under the discovery rules and could have been subpoenaed if the appellee had desired to prove the profits of the Paperboard Division. Not an iota of evidence was introduced to prove that the operations ever became profitable. Under such a state of the record the appellee is not entitled to recover and the Trial Court's Finding of Fact which, in effect, made a new contract which neither of the parties ever contemplated, is clearly erroneous.

ARGUMENT ON SPECIFICATION OF ERROR NO. 2

Summary of Argument

Appellee and appellant made an oral modification of the existing executory contract with reference to appellee's compensation during the month of January, 1949, reducing his future commission from three per cent to one and one-half per cent. The trial judge held there was no valid modification because no new consideration was promised to or received by appellee. (Findings of Fact Nos. X, XI) Such finding is clearly erroneous. Under the decisions of the State of Washington, and the law generally elsewhere, including the law in the federal jurisdiction, such a modification needs no fresh consideration to be binding upon the parties.

The Contract Was Executory

Up until December 31, 1948, appellee was paid three per cent commission pursuant to his agreement with appellant. (Par. VIII of Complaint, Tr. 5) As of that date appellee, at his own suggestion, agreed to reduce his future commissions from three per cent to one and one-half per cent until the Paperboard Division's operations became profitable. (Tr. 97, 109, Ex. A-6) It is emphasized that as to future commissions the contract of employment was entirely executory. This was not an agreement to reduce appellee's compensation on sales already made, but the agreement dealt solely with commissions to be earned in the future.

It is appellant's contention that this modification constituted a new binding agreement, superseding the previous contract. The trial court held that there must be consideration for a modification of an existing executory contract. The authorities show that the trial court was in error.

No Fresh Consideration Is Required for a Binding Modification of an Executory Contract

The leading Washington case establishing this proposition is *LaPlante v. Hubbard*, 125 Wash. 621, 217 Pac. 20 (1923). In that case there was a contract between the plaintiff as seller and the defendant as buyer for the cutting and delivery of railroad

ties from a certain tract of land. After a part of the ties had been cut and delivered the defendant buyer learned that he would require less than the amount of ties which could be produced from the tract of land. It was then agreed between the parties that the buyer would pay for the ties already cut but not yet delivered by plaintiff seller at the contract rate and that the balance of the contract would be cancelled. Some time later plaintiff seller sued defendant buyer seeking to recover among other items, damages resulting from the buyer's failure to purchase the balance of the ties that could have been cut from the tract of land, as buyer was obligated to do under the original contract. It was urged that there was no consideration for the agreement cancelling the balance of the contract and that therefore plaintiff was entitled to recover in accordance with the terms of the original contract. The court stated (125 Wash. at 625):

“We do not think it is or should be the law that any new consideration was required to make the second agreement enforceable. Every day in the business world men relieve one another from the performance of certain agreements, and it has never been thought that any new consideration was necessary to the validity of such agreements. The second agreement was a new contract, taking the place of the first, which had not been executed by either of the parties, and the first was a sufficient consideration for the second.

“In 6 R.C.L. p. 923, it is said:

“ ‘It is always competent for the parties to rescind a subsisting simple contract by a naked agreement to that effect. So far as the contract remains executory, it may be said that the agreement to annul on one side may be taken as the consideration for the agreement to annul on the other side, although a consideration is necessary to release a right of action which has accrued for a breach of the contract. Though there is authority to the effect that a new consideration is essential to substitute one contract in the place of another, the correct rule is that there is a sufficient consideration when a new contract is substituted for an old one. The mutual, unexecuted undertakings of an existing contract are a sufficient consideration for the cancellation of such contract and the substitution of a new one with different terms, and it is immaterial that, for a moment during the interval, there is technically a breach of the old agreement, since by the new agreement both parties treat the old one as an existing contract, and mutually agree to a rescission of it.’

“See, also, to the same effect 13 C. J. 592.”

Other Washington cases reaffirm the proposition under consideration. In *Hunter's Cattle Co. v. Carstens Packing Co.*, 129 Wash. 377, 225 Pac. 68 (1924) plaintiff and defendant contracted whereby plaintiff would render certain services and furnish hay to cattle owned by defendant for a consideration of \$9.00 per ton of hay so furnished. The original contract provided that the hay was to be placed in feed boxes. During the performance of this agreement it was orally modified so that plaintiff was required only to spread the hay in the corral. The action was to recover the agreed price for the sup-

plies and services rendered during the life of the contract and the defense was that plaintiff had breached the contract by failing to supply the hay in boxes. It was argued by defendant that the claimed modification was void because without consideration. The court stated (129 Wash. at 378):

“At the time of this modification of the original contract, it was clearly executory in a very large measure, both on the part of the appellant and respondent; the cattle not only then still being in the care of respondent for appellant, but it being then apparent that such continuing performance of the contract would extend over a considerable time in the future.”

The court stated the rule as follows:

“* * * while a contract remains executory in a substantial measure on both sides, an agreement to annul or modify on one side is a consideration for an agreement to annul or modify on the other side. Plainly, we think such was the condition attending the performance of this contract at the time of its modification by the parties.” (Citing *LaPlante v. Hubbard*, supra)

In *Inman v. Roche Fruit Co.*, 162 Wash. 235, 298 Pac. 342 (1931) there was a written contract for the sale of cherries which provided that packing should be done by the sellers. There was a subsequent oral modification by which it was agreed that the buyer would perform the packing. The plaintiff seller sued for a balance due on the purchase price and the defendant buyer defended on the ground of breach of the obligation of the seller to pack. As against the contention of the buyer that the modi-

fication was not binding because of absence of consideration, the court said (162 Wash. at 241):

“* * * The contract, when modified by the subsequent oral agreement, is substituted for the contract as originally made, and the original consideration attaches to and supports the modified contract.” (Citing a number of Washington cases)

A recent case, *Meyer v. Strom*, 37 Wn. (2d) 818, 226 P. (2d) 218 (1951) cites and relies upon the *Hunter* and *Inman* cases, *supra*. That case involved a contract for the lease of certain well drilling equipment. While the contract was still executory, a reduction of the rental charges was agreed upon between the parties. The lessor contended that the modification was not supported by consideration and was therefore not binding. The court recited that the lease was executory on both sides at the time of the modification, and stated (37 Wn. (2d) at 829):

“Under these circumstances, the original consideration was sufficient to support the subsequent modification.” (Citing cases)

The rule of these cases was most recently reaffirmed by the Washington Supreme Court in *Nielson v. Northern Equity Corp.*, 147 Wn. Dec. 155, 286 P. (2d) 1034 (1955), citing the *LaPlante*, *Hunter* and *Meyer* cases, *supra*.

In the case at bar there is no contention that the plaintiff agreed to receive a lesser commission for sales already made by him. The agreement for a

lesser commission operated only "in futuro" from the date of the modification. *As to that portion of the original contract modified by the subsequent agreement on the part of plaintiff to accept a lesser commission, the original contract was wholly executory.* The rule of the above cited cases would thus apply.

The cases in the federal jurisdiction are in accord. In *Savage Arms Corp. v. United States*, 266 U. S. 217, 69 L. Ed. 253, the Court referred to the rule as being so elementary as to need no authorities, in the following language at page 220:

"* * * It is enough to say that the parties to a contract may release themselves, in whole or in part, from its obligations so far as they remain executory, by mutual agreement, without fresh consideration. The release of one is sufficient consideration for the release of the other. If authority for a rule so elementary be required, see, for example: *Hanson & Parker v. Wittenberg*, 205 (221) Mass. 319, 326, 91 N. E. 383; *Collyer v. Moulton*, 9 R. I. 90, 92, 98 Am. Dec. 370; *McCreery v. Day*, 119 N. Y. 1, 7, 6 L.R.A. 503, 16 Am. St. Rep. 793, 23 N. E. 198; *Dreifus v. Columbian Exposition Salvage Co.*, 194 Pa. 475, 486, 75 Am. St. Rep. 704, 45 Atl. 370."

The Supreme Court of the United States has affirmed the language used in the *Savage* case in *Hartsville Oil Mill v. United States*, 271 U. S. 43 at p. 50, 70 L. Ed. 822 at p. 827.

In *Mid-State Products Co. v. Commodity Credit*

Corp., 196 F. (2d) 416 (7 Cir. 1952) the court stated at p. 420:

“There can be no doubt of the right of the parties to an executory contract to amend its provisions. As the Court said in *Savage Arms Corporation v. U. S.*, 266 U. S. 217, 220, 45 S. Ct. 30, 31, 69 L. Ed. 253 ‘* * * parties to a contract may release themselves, in whole or in part, from its obligations so far as they remain executory, by mutual agreement without fresh consideration. * * *’”

See also *Abrams v. Astor*, 170 F. (2d) 544 (2 Cir. 1948)

Consideration Moved to Appellee

If, notwithstanding the foregoing authority, consideration is deemed required to make the modification binding, there was consideration aplenty. The appellant had the privilege of discharging the appellee at any time had it chosen so to do, but instead relied in good faith upon the modification for over three years.

It must be remembered that the terms of Exhibit 3 do not specify the duration of that agreement. The parties did not incorporate a five-year period in Exhibit 3 as they had stated they would do in Exhibit 1. Paragraph 5 of Exhibit 3 clearly states that that agreement contains all of the terms of the agreement. So we have a contract for personal services without a termination date. Such contracts are terminable at the will of either party. *Davidson v.*

Mackall-Paine Veneer Co., 149 Wash. 685, 271 Pac. 879 (1928); Restatement of Contracts, Sec. 32 pp. 40-41, *Illustration 1*; 12 Am. Jur. 860, "Contracts," Sec. 305; 17 C.J.S. 887, "Contracts," Sec. 398.

Appellee was fully aware that the Paperboard Division was not a profitable venture and was so concerned by this fact that he proposed to reduce his compensation by one-half. (Tr. 97, Ex. A-6) There were several courses of action open to appellant to correct this situation, many of which would have worked to appellee's detriment. In addition to discharging appellee, appellant could have simply closed the Paperboard Division and appellee would have had no recourse. Any number of other courses of action could have been taken. Appellant, however, did not take these courses of action but relying in good faith upon appellee's proposal to reduce his commissions by one-half continued to keep him in its employ for over three years thereafter. Therefore, the fact that appellant continued to keep appellee in its employ is sufficient consideration for appellee's promise to take a lesser rate of pay.

In summarizing appellant's contentions under specification of Error No. 2, the evidence shows without dispute that appellee and appellant modified the terms of the contract with regard to appellee's compensation. Thereafter, the modified con-

tract was in full force and effect and appellant's obligation to pay three per cent commission was cancelled and of no further effect. Appellant has fully complied with the contract as so modified and appellee cannot now repudiate the modified contract and insist upon enforcing the original contract. The District Court was thus in error in holding that after appellant had in good faith relied upon the terms of the modification for over three years, appellee could repudiate the modification.

ARGUMENT ON SPECIFICATION OF ERROR NO. 3

Summary of Argument

When appellee and appellant disagreed as to whether the appellee should be the sales representative for appellant's products and at the same time organize and finance a competing company, the parties entered into a binding accord and satisfaction with reference to the termination of appellee's relationship with appellant. That accord and satisfaction was fully carried out in all of its terms by appellant and appellee and is now estopped from repudiating his agreement.

The Agreement of July, 1951, Constituted an Accord and Satisfaction of All Obligations Between the Parties

When appellee began organizing the competing California Paperboard Company appellant did not want appellee to continue in its organization as ap-

pellant's sales representative and negotiations were begun to arrange for a termination of appellee's connection with appellant. (Tr. 98, 99, 100, 101, 228, 249, 267) A dispute arose as to the terms and conditions under which such termination should take place. It must be remembered that appellan^{ee}~~t~~'s financial interest in the board mill had been terminated when appellant purchased in November, 1947, appellee's \$50,000 stock investment for \$135,000. The only interest which appellee had thereafter was that of an employee working on commission. Appellee wanted his termination date to be fixed as of December, 1952, and appellant desired a termination date of September 1, 1951. (Tr. 101, 102, 103, 228-238)

In pressing his contention that the termination date should be December, 1952, appellee wrote the letter dated July 12, 1951 (Ex. A-1), in which appellee pointed out that he had voluntarily reduced his commissions from three per cent to one and one-half per cent. This was a factor which appellee wanted to be taken into consideration in arriving at a termination date. Thereafter appellee and the President of appellant corporation had a conference in which it was agreed that the termination date of appellee's services would be September 1, 1951, but that his compensation of one and one-half per cent would continue on for six months, until

February 29, 1952. This is confirmed by the letters written by appellee thereafter. In his letter of November 21, 1951, appellant states (Ex. A-2):

“As I recall our agreement, a figure of one and one-half per cent commission on boardmill sales would be paid me for six months, starting with the 1st of September.”

This letter constitutes a clear written admission that the agreement for termination provided that appellee would work until September 1, and that thereafter he would receive six months pay without having to work for the same, as contended by appellant.

On April 7, 1952, appellee wrote a letter to appellant (Ex. A-3) stating:

“Apparently your staff has overlooked sending me the commission check for February, we had agreed that this would be the last one.”

Certainly this letter acknowledges the fact that under the termination agreement the last money appellee was to receive from appellant was his commission check for February, 1952. If appellee had any other intention it was a secret intent not disclosed to appellant.

On April 8, 1952, appellant wrote to appellee (Ex. A-4) stating:

“Enclosed herewith is our check together with statement covering sales in the Board Division for the month of February. This completes our commitment to you as previously agreed upon.”

The check for the February commission was enclosed with that letter and cashed by appellee (Ex. A-5)

Upon receipt of Ex. A-4 and A-5 appellee was advised that the check was the last money he was to receive from appellant pursuant to their agreement. Appellee accepted the check and cashed it. Thus the entire transaction was completed and consummated. The authorities are in accord in holding that the courts will not disturb an agreement which has been consummated and carried out. The District Court, however, erred in holding to the contrary. It is important to note that appellee himself did not testify that he disclosed to appellant any claim to recover commissions at the original rate, in the negotiations leading to his termination, or at any time prior to writing his letter of June 5, 1953. (Ex. A-6)

The Law of Accord and Satisfaction

It is the law of Washington that

“* * * where a claim is unliquidated or in dispute, payment and acceptance of a less sum than claimed when tendered in satisfaction operates as an accord and satisfaction.”

James v. Riverside Lbr. Co., 121 Wash. 130, 133, 208 Pac. 260 (1922)

“An accord is an agreement for the settlement of a claim by some performance other than that which is due, and is governed by the principles of contract. * * * To create it, there must be a meeting of the minds upon the subject and an

intention by both parties to make such an agreement.”

Boyd-Conlee Co. v. Gillingham, 44 Wn. (2d) 152, 155, 266 P. (2d) 339 (1954)

The assent of the creditor to an accord and satisfaction may be manifested by express agreement to receive the tendered amount in full satisfaction, or by acceptance of the amount, knowing “that the debtor intends the check to be considered as full payment.” *Graham v. N. Y. Life Ins. Co.*, 182 Wash. 612, 47 P. (2d) 1029 (1935).

In this case the evidence establishes an accord and satisfaction in that appellee made an express agreement in July, 1951, to accept commissions at the rate of one and one-half percent for a period of six months after his services were terminated. If independent consideration is needed to support an accord and satisfaction this would certainly be sufficient. Appellee’s letter of July 12, 1951 (Ex. A-1), which preceded the O’Reilly-Turcotte conference, establishes that the entire matter of O’Reilly’s rights under the employment agreement were under consideration. Appellee now contends that he did not intend to compromise the matter of his rate of commission, but does not claim that he disclosed his intention in that regard to appellant. That being the case, his secret intention to make a further claim in the future would not prevent a meeting of the minds so as to constitute an accord. In *Bond v. Wie-*

gardt, 36 Wn. (2d) 41, 216 P. (2d) 196 (1950) the Washington Supreme Court said at p. 54:

"The unexpressed understanding of one of the parties to a contract as to its meaning is usually of no legal significance (Restatement, Contracts, p. 74, Sec. 71), and testimony tending to show secret, undisclosed intention will ordinarily be excluded, as it cannot be used to overthrow the effect of the intention actually made manifest in the contract."

This principle is declared in 12 Am. Jur. 516, "Contracts", Sec. 19, as follows:

"The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from their outward expressions and acts and not from an unexpressed intention. It is said that the meeting of minds, which is essential to the formation of a contract, is not determined by the secret intentions of the parties, but by their expressed intentions which may be wholly at variance with the former."

A closely analogous case on this point is that of *Austin v. Union Lbr. Co.*, 95 Wash. 608, 164 Pac. 245 (1917). There a logger sold and delivered a raft of logs to the defendant, at an agreed price per thousand feet board measure. He had scaled the logs at 71,384 feet. The defendant scaled them at 39,878 feet. The evidence showed that the logger had gone to the defendant's office, been presented with and examined a statement of account showing the defendant's computations as to the contents of the raft, and certain countercharges against him, and had accepted and cashed a check in the amount of the

balance, without disclosing that he had scaled the logs differently, or that he claimed any other amount due. Suit was brought by the logger's receiver for the amount claimed due on the sale of the logs, based on the logger's computations. The defendant pleaded an accord and satisfaction.

The Washington Supreme Court said (95 Wash. at 610-11) :

"If it can be gathered from the transaction of the parties that a settlement and satisfaction was intended, that a balance is actually struck, and that the one pays and the other accepts without protest or objection of any kind, it is viewed in law as a closed account notwithstanding one of the parties may secretly intend to, and thereafter does, treat the account as still an open one; * * *"

The applicability of that ruling to this case is clear; in each case the debtor rendered the creditor an account showing the amount due and the creditor received the amount shown due by the account without protest or objection, and with knowledge that it was intended in full satisfaction. In each case the creditor harbored a secret intent to make a further claim, and in each case the law gives no effect to that secret intent.

Appellee's apparent assent to the compromise agreement as a complete settlement of his rights arising out of the employment agreement, is therefore operative to the exclusion of his secret intentions, and the compromise agreement constituted

an accord which has now been fully executed by payment and acceptance of the sums agreed upon.

If, nevertheless, legal effect is given to appellee's secret intention, so as to prevent the compromise agreement from becoming an accord, it is clear that the exchange of correspondence of April 7 and 8, 1952 (Ex. A-3, A-4), following by appellee's cashing the check for the February commission (Ex. A-5), constitutes an accord and satisfaction by acceptance, knowing that appellant intended the check to be considered as a full and final payment.

**Appellant Having Performed Under the July, 1951,
Agreement, Appellee Is Estopped from Repu-
diating That Agreement**

It is stated in 12 Am. Jur. 987, "Contracts", Sec. 408:

"After one party has performed, and the other party has accepted the performance of, a parol agreement modifying a written contract, it is too late to raise the question of a want of consideration for the modification."

In 17 C.J.S. 862-3, "Contracts", Sec. 376, it is stated:

"Where a modified agreement has been fully executed, it will not be disturbed for a want of consideration, and there are cases which hold that, where one party has performed a modified agreement to such an extent that it would work a fraud or injury on the other party to repudiate it, the modified contract will be sustained."

This rule was followed in *Vigelius v. Vigelius*, 169

Wash. 190, 13 P. (2d) 425 (1932). In that case a husband and wife entered into a written separation agreement prior to their divorce. The agreement provided as follows:

“The husband shall also at all times during the joint lives of the wife and himself, until their divorce and remarriage by the wife, pay to her on the first day of each and every month the sum of seventy-five dollars, as her sole and separate estate.”

Later, the parties entered into an oral modification of this written agreement whereby the husband agreed to pay a lesser sum per month than was stipulated in the original agreement. After reciting the rule that a contract executory on both sides may be modified without new consideration, the court went on to state (169 Wash. at 193):

“There is another general rule, well stated in the text of 13 C.J. 592, which, we think, is controlling in our present inquiry, as follows:

“‘Where a modified agreement has been fully executed, it will not be disturbed for a want of consideration * * *.’

“This statement of law has support not only in the decisions there cited, but also in the decisions rendered since the publication of that volume of *Corpus Juris*. *Maxwell v. Graves*, 59 Iowa 613, 13 N. W. 758; *In re Lamb's Estate*, 140 Iowa 89, 117 N. W. 1118, 18 L.R.A. (N.S.) 226; *Gray & Sons v. Satuloff Bros.*, 213 Ala. 526, 105 South. 666; *Davis v. Culmer*, 221 Mo. App. 1037, 295 S. W. 803; *State v. American Surety Co.*, 137 Ore. 394, 300 Pac. 511, 2 P. (2d) 1116; *Julian v. Gold*, 3 P. (2d) (Cal.) 1009; 1 Page on Contracts (2d. Ed.), Sec. 582.”

See, also, *Fuller v. Deacon*, 172 Wash. 489, 30 P.

(2d) 843 (1951), and *Meyer v. Strom*, 37 Wn. (2d) 818, 226 P. (2d) 218 (1951) *supra*, where the court said, p. 829:

“Moreover, since the agreement, as modified, had been fully executed subsequent to the modification and prior to the suit, we would not, in any event, disturb it for a want of consideration. *Vigelius v. Vigelius*, 169 Wash. 190, 13 P. (2d) 425; *Fuller v. Deacon*, 172 Wash. 489, 20 P. (2d) 843.”

The *Meyer* case was cited by our Supreme Court in December, 1953, in *Johnson v. Peterson*, 43 Wn. (2d) 816, 264 P. (2d) 237, where the court said:

“Also, the agreement, as the jury must have found it was modified, had been fully executed subsequent to the modification and prior to suit, by the delivery of the deed and payment of the price. Consequently, we would not, in any event, hold the modification invalid for want of consideration. *Meyer v. Strom*, 37 Wn. (2d) 818, 828, 226 P. (2d) 218 (1951), and cases cited.”

In *Douglas County Mem. Hosp. Assn. v. Newby*, 45 Wn. (2d) 784, 278 P. (2d) 330 (1954), the defendant was indebted to the plaintiff hospital in the amount of \$715.86. It was agreed between the parties that the defendant would pay the sum due in installments of \$20 per month over a period of three years. After the agreement had been in effect for over six months and the defendant had been making payments in substantial compliance with the contract, the plaintiff demanded that the defendant execute a note providing for interest on the amount then due which it could discount at the bank. The

trial court held that the written agreement whereby the defendant agreed to pay \$20 per month was not binding on the plaintiff because of lack of consideration. The appellate court cited the *Vigelius* case, *supra*, and described the basis of its holding in that case as follows (45 Wn. (2d) at 793) :

“* * * the former wife was estopped to deny that there had been a valid consideration for the modifying agreement after having accepted the payments called for in that agreement for twelve years.”

The court held in the *Douglas County* case that the plaintiff was estopped to deny a valid consideration for the installment contract. It went on to say (45 Wn. (2d) at 796) :

“* * * Respondent, having accepted from appellant the payments called for in the written contract for almost a third of the period contemplated by the parties, is in no position to urge that there was no consideration for the contract.”

These authorities are also in point upon appellant's second specification of error since appellant had fully complied with the modified agreement before suit was started.

Estoppel has been defined by the Washington Supreme Court as “A preclusion by act or conduct from asserting a right which might otherwise have existed, to the detriment of another who, in reliance on such act or conduct, has acted upon it.” *Reynolds v. Travelers Ins. Co.*, 176 Wash. 36, 45, 28 P. (2d)

310 (1934), recently approved in *Bowman v. Webster*, 44 Wn. (2d) 667, 269 P. (2d) 960 (1954).

The case of *Mall Tool Co. v. Far West Equip. Co.*, 45 Wn. (2d) 158, 273 P. (2d) 652 (1954) involves similar circumstances. There, Mall Tool had appointed Far West its exclusive distributor in a designated area, which distributorship entitled Far West to certain commissions on all sales of Mall's products in the area, regardless of who made the sales. The distributorship was terminable at will. Mall wrote Far West that, effective the following month, another distributor would be appointed for a portion of the Far West area, and that Far West would receive no further commission with respect to sales in that area. Far West protested that it was entitled to thirty days notice, and subsequently did receive its authorized commission on sales made during that period. The court said (45 Wn. (2d) at 168):

“When Far West stood by while Mall was paying a twenty five per cent commission to * * * (the new distributor) * * * which included the five per cent to which Far West claims it was entitled, without an unequivocal statement of its position, it waived any rights it might have had in connection with shipments subsequent to January 31, 1947, and is now estopped from asserting a claim for commissions on sales subsequent to that date.”

In summarizing, it is appellant's contention that when the parties agreed as to the conditions under

which appellee's employment would be terminated, such agreement covered all obligations between the parties. The final agreement was in fact a compromise on the part of both parties. Appellee wanted to remain on the payroll until December, 1952, and offered as a factor in favor of his retention that he had voluntarily reduced his commissions by one-half in January of 1949. Appellant wanted to take appellee off the payroll as of September 1, 1951. The result was a compromise. Appellee was to work until September 1, 1951, but would remain on the payroll for six months thereafter (Ex. A-2). Appellee thus used the fact of his voluntary reduction of pay to gain compensation for six months beyond that which appellant was willing to give him. (Tr. 235) This amounts to a true accord and satisfaction, compromising all differences between the parties. The terms of the accord and satisfaction have been fully carried out. Appellee left appellant's premises shortly after September 1, 1951, and went to Richmond, California, to work on his new mill. Appellant continued to pay commissions for an additional six months. It was then too late for appellee to go back and try to make a better deal.

ARGUMENT ON SPECIFICATION OF ERROR NO. 4**Summary of Argument**

The trial judge erred in holding as a matter of law that the unsigned contract, Plaintiff's Exhibit 3, calling for performance for a period in excess of one year, was not void by reason of the Statute of Frauds.

The Contract Was Not Signed

It is admitted that the original agency agreement, Plaintiff's Exhibit 3, was never signed by any of the parties. (Tr. 58) Despite this fact the trial judge found, in Finding of Fact No. XIV, that the appellant had failed to sustain its burden of proof as to the Statute of Frauds.

The Statute of Frauds in the State of Washington is found in RCW 19.36.010, which provides as follows:

"In the following cases any agreement, contract and promise, shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, is in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized;

"(1) Every agreement that by its terms is not to be performed in one year from the making thereof; * * *"

It will be noted that Exhibit B to appellee's complaint (Pl. Ex. 3) provides, in paragraph II, that the appellant could not terminate the agreement un-

til two years after the mill commenced production. The conditions under which the appellant could then terminate the appellee's employment are set forth in that paragraph. It is thus clear that Exhibit 3 is an agreement that by its terms is not to be performed within one year from the making thereof. As such that agreement is void by reason of the Statute of Frauds unless it is signed by the party to be charged. This was not done.

It is true that where a corporate resolution names all of the terms of the contract and is *signed*, such resolution may satisfy the Statute of Frauds. *Western Timber Company v. Kalama Riv. Lbr. Co.*, 42 Wash. 622, 85 Pac. 338 (1906). However, in this case, although Exhibit 3 was presented to the Board of Directors and the minutes of the meeting referred to the agreement, those minutes were never signed. Further, where a contract is not completely set forth in a corporate resolution, then the contract is not "a contract in writing." *Aall v. Riverside Irrigation Dist.*, 157 Wash. 442, 289 Pac. 22 (1930). Where the resolution is not fully signed it does not constitute a contract in writing within the meaning of the Statute of Frauds. 5 Fletcher Cyclopedia (1952, Rev. Vol.) Sec. 2206.

Thus we have Exhibit 3, without the signature of the party to be charged or any substitute therefor which would provide a signature.

Regardless of what the law may be in other jurisdictions, in the State of Washington the length of time contemplated by the parties for performance of a contract governs the application of the Statute of Frauds.

In *Fish Clearing House v. Melchior, Armstrong Dessau Company*, 174 Wash. 539, 25 P. (2d) 381 (1933) a fish broker sued to recover commissions on the defendant's purchases of salmon from a particular producer. The defendant had agreed by oral contract to pay the plaintiff one cent per pound of salmon purchased from the particular producer involved. The plaintiff argued that the contract was not within the Statute of Frauds because, in effect, the defendant could terminate the contract at any time by not purchasing fish from the producer. The Court, nevertheless, held that the parties contemplated performance for more than one year. Therefore the contract was within the Statute of Frauds and the Court stated, at page 545:

"The modification of the rule stated in the case of *In re Fields' Estate, supra*, is tersely expressed in *Tracey v. Barton*, 139 Wash. 440, 247 Pac. 734, in the following language:

" 'We have held that, when no time for the performance of a contract is fixed by the parties, if it nevertheless appears from the surrounding circumstances and, considering the object contemplated by the contract, that the parties intended that it should extend over a year, recovery could not be had upon it, unless in writing'."

As heretofore stated, paragraph 2 of Exhibit 3 shows that the parties contemplated that the agreement should continue for at least two years. Therefore the Statute of Frauds is applicable and the contract is void unless signed by the party to be charged.

Partial Performance Does Not Take the Contract Out of the Statute of Frauds

The issue of the Statute of Frauds was properly raised at the time of trial and the Court erroneously found, in Finding No. XIV, that the burden of proof upon the Statute of Frauds had not been met. The trial court undoubtedly was of the erroneous opinion that partial performance of the contract would take it out of the operation of the Statute of Frauds. The Court expressed this opinion on page 75 of the transcript as follows:

“There are more ways than merely signing a paper to authenticate its coming into being as a thing which may represent or might be contended to represent the contract in question.”

The defense of the Statute of Frauds in the State of Washington is not overcome by partial performance of a contract, in a situation, such as here, where the basis for invoking the Statute of Frauds is that the contract was not to be performed within one year.

In *Union Savings & Trust Company v. Krumm*,

88 Wash. 20, 152 Pac. 681 (1915), the Court stated, on page 33:

"The respondent insists that there was such part performance, both of the logging contract and of the hauling contract, as to take them out of the statute of frauds. The doctrine of part performance, however, has no application to this clause of the statute of frauds. In the nature of the case, where the statute is directed solely to the character or subject-matter of the contract, part performance could not remove the ban of the statute without in effect repealing the statute. The rule is clearly stated by Pomeroy:

" 'The clause relating to contracts not to be performed within a year from the making thereof, seems by its very terms, to prevent any validating effect of part performance upon all agreements embraced within it. As the prohibition related not to the subject-matter, nor to the nature of the undertaking, but to the *time of the performance itself*, it seems impossible for any part performance to alter the relations of the parties, by rendering the contract one which, by its terms, may be performed within the year. It has, indeed, been held in some cases, that if all the stipulations on the part of the plaintiff are to be performed within a year, an action will lie for a breach of the defendant's promise, although it was not to be performed within the year, and was not in writing. In all these cases, however, the promise of the defendant was simply for the payment of the money consideration, which might, in every instance, have been sued for and recovered upon his implied promise; and the doctrine itself has been expressly and emphatically repudiated by numerous other decisions.' Pomeroy, Contracts, (2d ed.), p. 141."

It should be further pointed out that the ad-

missions by the appellant to the effect that Exhibit 3 sets forth the terms of the appellee's employment, but denying that the agreement was ever signed by the person to be charged, do not take the agreement out of the Statute of Frauds. See Note in 22 A.L.R. 723, where the rule supported by voluminous authorities, is said to be:

"The rule appears to be well settled that the mere fact that one in his pleading admits the parol contract relied upon by the other party to the suit does not prevent him from, at the same time, setting up and insisting upon the statute of frauds as a defense thereto."

As stated in *Ragghiati v. Harris*, 124 Cal. App. (2d) 17, 268 P. (2d) 45 (1954):

"Oral repetition of that which is required to be in writing does not take the place of the writing."

CONCLUSION

Without attempting a restatement of the argument on each of appellant's Specifications of Error it is submitted that the trial court's judgment cannot be sustained under any view of the evidence, and is contrary to justice, common sense and the law of Washington in each of the respects heretofore discussed.

Briefly stated, the parties entered upon an agreement for the employment of appellee by appellant for an indefinite period in excess of one year, but this agreement was never signed. The contract was

therefore void and unenforceable. Moreover, it was terminable at the will of either party after a period of two years.

During the period of his employment, appellant, in his own words, "voluntarily reduced" his rate of commission until the operation became profitable. It was not shown that it ever became profitable. The trial court held that such a modification was not binding on the appellee, and further found that appellee merely agreed to postpone collection of a portion of his compensation. Appellee himself did not so testify, and there is no evidence that such was his intention at the time of the modification, much less that such intention was communicated to appellant.

Finally, when appellee became financially interested in another paperboard enterprise, and proposed to continue in his employment with appellant at the same time, a compromise was reached between the parties as to the termination of his compensation from appellant, by which he received commissions for a period of six months beyond the date proposed by appellant. One of the arguments advanced by appellee in his favor at that time was his prior voluntary reduction of his commission. At no time until more than one year after receiving the last payment under this final agreement, being approximately two years after the agreement it-

self, did he disclose to appellant that he made claim to further compensation in the amount by which he had "voluntarily reduced" his commissions over four and one-half years earlier.

The judgment appealed from must be reversed.

Respectfully submitted,

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**United States Court of Appeals
For the Ninth Circuit**

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Appellant,

vs.

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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE — CROSS-APPELLANT

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INDEX

| | <i>Page</i> |
|--|-------------|
| BRIEF OF APPELLEE..... | 1 |
| Counter-Statement of the Case..... | 1 |
| Argument | 3 |
| Argument on Appellant's Specification of Error | |
| No. 1 | 3 |
| Argument on Appellant's Specification of Error | |
| No. 2 | 7 |
| Argument in Answer to Specification of Error | |
| No. 3 | 13 |
| Conclusion | 28 |
| BRIEF ON CROSS-APPEAL..... | 31 |
| Question Involved | 31 |
| Specification of Error..... | 32 |
| Argument | 32 |

TABLE OF CASES

| | |
|--|------------|
| <i>Abrams v. Astor</i> , 170 F.(2d) 544 (2 Cir., 1948)..... | 8 |
| <i>Allen v. Farmers & Merchants Bank</i> , 76 Wash. 51, 135 Pac. 621 (1913)..... | 10 |
| <i>Bach v. Friden Calculating Machine Co.</i> , 155 F.(2d) 361 (9 Cir., 1946)..... | 15 |
| <i>Barbo v. Norris</i> , 138 Wash. 627, 245 Pac. 414 (1926).. | 33 |
| <i>Bellingham Securities Syndicate, Inc., v. Belling-</i> <i>ham Coal Mines, Inc.</i> , 13 Wn.(2d) 370, 125 P. (2) 668 (1942)..... | 13, 17, 22 |
| <i>Benner v. Billings</i> , 107 Wash. 1, 181 Pac. 19 (1919).. | 33 |
| <i>Berol v. Berol</i> , 37 Wn.(2d) 280, 223 P.(2d) 1055 (1950) | 33 |
| <i>Bowman v. Webster</i> , 44 Wn.(2d) 667, 269 P.(2d) 960 (1954) | 22 |
| <i>Boyd-Conlee Co. v. Gillingham</i> , 44 Wn.(2d) 152, 266 P.(2d) 339 (1954)..... | 21 |
| <i>Coe v. Hobby</i> , 72 N.Y. 141, 28 Am. St. Rep. 120..... | 11 |
| <i>Conlan v. Spokane Hardware Co.</i> , 117 Wash. 378, 201 Pac. 26 (1921)..... | 21 |
| <i>Dornberg v. Black Carbon Coal Co.</i> , 93 Wash. 682, 161 Pac. 845 (1916)..... | 33 |

| | <i>Page</i> |
|--|-------------|
| <i>Douglas County Mem. Hosp. Assn. v. Newby</i> , 45 Wn.(2d) 784, 278 P.(2d) 330 (1954)..... | 21 |
| <i>Durband v. Nicholson</i> , 205 Iowa 1264, 216 N.W. 278.. | 11 |
| <i>Evans v. Ore. & Wash. R. Co.</i> , 58 Wash. 429, 108 Pac. 1095, 28 LRA (NS) 455 (1910)..... | 21 |
| <i>Goldsborough v. Gable</i> , 140 Ill. 269, 29 N.E. 722, 15 L.R.A. 294 | 11 |
| <i>Grace Bros. v. C.I.R.</i> , 173 F.(2d) 170 (9 Cir., 1949).. | 15 |
| <i>Hansen & Rowland v. C. F. Lytle Co.</i> , 167 F.(2d) 170, rehearing denied 167 F.(2d) 998 (1948)..... | 34 |
| <i>Hartsville Oil Mill v. United States</i> , 271 U.S. 43, 70 L.Ed. 822..... | 8 |
| <i>Hill v. Brandes</i> , 1 Wn.(2d) 196, 95 P.(2d) 382 (1939) | 33 |
| <i>Hunters Cattle Co. v. Carstens Packing Co.</i> , 129 Wash. 377, 225 Pac. 68 (1924)..... | 7 |
| <i>Inman v. Roche Fruit Co.</i> , 162 Wash. 235, 298 Pac. 342 (1931) | 7 |
| <i>Keane v. Fidelity Savings & Loan Association</i> , 173 Wash. 199, 22 P.(2d) 59 (1933)..... | 10, 12 |
| <i>LaPlante v. Hubbard</i> , 125 Wash. 621, 217 Pac. 20 (1923) | 8 |
| <i>Lewis v. McReavey</i> , 7 Wash. 294, 34 Pac. 832 (1893) | 12 |
| <i>Lloyd v. American Can Co.</i> , 128 Wash. 298, 222 Pac. 876 (1924) | 33 |
| <i>Malcolm v. Yakima County Consolidated School District No. 90</i> , 23 Wn.(2d) 80, 159 P.(2d) 394 (1945) | 34 |
| <i>Mall Tool Co. v. Far West Equip. Co.</i> , 45 Wn.(2d) 158, 273 P.(2d) 652 (1954)..... | 22 |
| <i>Meyer v. Strom</i> , 37 Wn.(2d) 818, 226 P.(2d) 218 (1951) | 7 |
| <i>Mid State Prods. Co. v. Commodity Credit Corp.</i> , 196 F.(2d) 416 (7 Cir., 1952)..... | 8 |
| <i>Mosher v. Mosher</i> , 25 Wn.(2d) 778, 172 P.(2d) 259 (1946) | 11 |
| <i>Nielson v. Northern Equity Corp.</i> , 147 Wash. Dec. 155, 286 P.(2d) 1034 (1955)..... | 8 |

TABLE OF CASES

v

Page

| | |
|---|--------|
| <i>Paramount Pest Control Service v. Brewer</i> , 177 F.(2d) 564 (9 Cir., 1949)..... | 15 |
| <i>Parks v. Elmore</i> , 59 Wash. 584, 110 Pac. 381 (1910) .. | 33 |
| <i>Plotkin v. Green</i> , 36 Wn.(2d) 253, 217 P.(2d) 610 (1950) | 15 |
| <i>Queen City Construction Co. v. Seattle</i> , 3 Wn.(2d) 6, 99 P.(2d) 407 (1940)..... | 11, 12 |
| <i>Reynolds v. Travelers Ins. Co.</i> , 176 Wash. 36, 28 P.(2d) 310 (1934)..... | 22 |
| <i>Ryan v. Plath</i> , 20 Wn.(2d) 663, 148 P.(2d) 946 (1944) | 33 |
| <i>Savage Arms Corp. v. United States</i> , 266 U.S. 217, 69 L.Ed. 253..... | 8 |
| <i>Seattle Investors Syndicate v. West Dependable Stores</i> , 177 Wash. 125 30 P.(2d) 956 (1934)..... | 13 |
| <i>Vigelius v. Vigelius</i> , 169 Wash. 190, 13 P.(2d) 425 (1932) | 21 |
| <i>U.S. v. Skinner & Eddy Corp.</i> , 28 F.(2d) 373, modified 35 F.(2d) 889, certiorari dismissed 281 U.S. 770, 50 S.Ct. 248, 74 L.Ed. 1176 (1930-9 Cir.).... | 33, 34 |
| <i>Westland Construction Co. v. Chris Berg, Inc.</i> , 35 Wn.(2d) 824, 215 P.(2d) 683 (1950)..... | 12 |
| <i>Woodbridge v. Johnson</i> , 187 Wash. 191, 59 P.(2d) 1135 (1936) | 33 |

TEXTBOOKS

| | |
|--|----|
| 12 Am. Jur. Contracts, Sec. 412, page 990..... | 11 |
|--|----|

COURT RULES

| | |
|--|----|
| Federal Rules of Civil Procedure, Rule 52..... | 15 |
|--|----|

United States Court of Appeals

For the Ninth Circuit

PUGET SOUND PULP & TIMBER Co.,
a corporation, *Appellant,*

vs.

JOE A. O'REILLY, *Appellee.*

JOE A. O'REILLY, *Cross-Appellant,*

vs.

PUGET SOUND PULP & TIMBER Co.,
a corporation, *Cross-Appellee.*

No. 14906

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE — CROSS-APPELLANT

COUNTER-STATEMENT OF THE CASE

Appellee takes issue with appellant's statement that the Statute of Frauds was pleaded as an affirmative defense (Appellant's Brief page 2). Although the Answer contains seven affirmative defenses, the Statute of Frauds is not among them (Tr. 19-29).

Appellee further takes issue with appellant's assertion that the California Paperboard Co., in which O'Reilly became interested in 1951, would be competing with the paperboard division of appellant, and that his interest therein amounted to breach of his employment agreement. The record is to the contrary (Tr. 118-119). It further appears that the California Paper-

board Co. did not commence production until November, 1951, four months after the conversation which appellant contends resulted in an accord and satisfaction (Tr. 119; Finding XII; Tr. 403).

The remainder of appellant's Statement of the Case is substantially accurate. However, appellee considers the following additional facts of importance and necessary to a consideration of the issues presented by the appeal and cross-appeal:

(a) Exhibit "A" to the complaint (Exhibit 1 in evidence) (Tr. 8), the contract of May 22, 1946, is in writing and signed by appellant and appellee.

(b) Exhibit "B" to the complaint (Exhibit 3 in evidence) (Tr. 15), the contract of June, 1946, is in writing and unsigned. The parties are O'Reilly and *Bellingham Paper Products Co.* (not appellant) and is referred to as the "Agency Agreement" (Tr. 90-91).

(c) Appellant in its Statement of the Case (Tr. 2) states, "This is an action by Joe A. O'Reilly, appellee, to recover additional commissions claimed to be due him under an agency agreement . . ." As the complaint (Tr. 3-8) indicates, appellee pleaded both agreements. Appellee does not purport to rely solely on Exhibit "B."

(d) The Bellingham Paper Products Co., by its Board of Directors (Exhibit 5), adopted the "Agency Agreement" (Exhibit "B" to the complaint) (Exhibit 3) (Tr. 90-91).

(e) When Bellingham Paper Products Co. was dissolved in December, 1947, Exhibit 10, dated Dec. 1, 1947, was signed. This was a contract in writing be-

tween Turcott and Evans as liquidating trustees of Bellingham Paper Products Co. on the one hand, and Puget Sound Pulp & Timber Co. on the other. That agreement provides, in part, as follows:

“It is understood that the following are accomplished hereby:

“(a) A transfer of all interest of Bellingham Paper Products Co. in and to its Agency Agreement with Joe A. O’Reilly;”

It is stipulated that the “Agency Agreement” therein referred to is Exhibit 3 (Exhibit “B” attached to the complaint) (Tr. 89-91). It will be noted that this Exhibit 10 is signed “by the party to be charged,” Puget Sound Pulp & Timber Co.

ARGUMENT

Argument on Appellant’s Specification of Error No. 1

Appellant argues under this specification that the court’s finding that (Tr. 38) O’Reilly advised appellant that

“ . . . he would temporarily reduce his commission to one and one-half per cent of net sales of the Paperboard Division of defendant corporation, and would *in effect* postpone collection of the remainder thereof.” (Emphasis supplied)

is not supported by “an iota of evidence,” and extensive excerpts from appellee’s testimony are quoted to demonstrate that he did not testify that he was going to “postpone” collection of the balance.

Observe that the trial court did not find that O’Reilly so testified or that any such express language was used by either party to the conversation. The court finds that

O'Reilly would "*in effect*" postpone the collection of the remainder. The function of the Findings is to find ultimate facts, or factual conclusions and not evidentiary matters. The *ultimate* fact is amply supported by the evidence (Tr. 96-97, 109-113, 143-144, 157, 159-160, 213, 217, 225-226, 259-260).

The trial court found the necessary effect of O'Reilly's testimony to be that he would temporarily reduce his commissions and postpone the collection thereof. That it does not purport to be an evidentiary finding is demonstrated by the fact that the reference "until the operation became profitable" (Tr. 97, Ex. A-6), which appellant deems significant in its argument, is completely omitted from the finding. It was omitted not because it wasn't said (Tr. 97), but because it was without legal significance.

The finding is a conclusion of mixed fact and law and is derived from the court's oral decision wherein the court said:

"There was no valid accord and satisfaction entered into by and between these parties, because the defendant company neither did nor omitted to do any act or thing as to which it was not already obligated to do in consequence of any suggestion on plaintiff's part that he was in effect *postponing* the collection of one and one-half per cent, in other words, one-half of his contracted commissions in this case. Nor did plaintiff thereafter lessen his efforts to perform his part of the agency contract." (Tr. 290)

Appellant further argues that no showing was made that the operation ever became profitable and that the

burden was on appellee to prove it (Brief pp. 17-18). That this is untenable is demonstrated by the fact that:

1. O'Reilly had no interest in the profits or losses of the appellant. No benefit would flow to him by an increase or decrease in profits. His commissions were entirely based on sales (Exs. 1 and 3). Hence there cannot be found in that phase of his remark any consideration for the reduction of his commission.

2. Furthermore, whether or not the Paperboard Division made a profit was a matter largely dependent on what system the appellant corporation used in computing costs. There is no evidence that the division was ever actually unprofitable. The appellant, purely for statistical accounting data purposes, billed slush pulp to the division not at cost, as raw materials to the other divisions were handled, but at average market price (Tr. 261, 264).

"Q. Mr. Turcotte, when you were in the habit in 1948 of billing to the division of pulp at average market, the fact that that resulted in a loss in that division did not necessarily mean you were losing money from the operation of that division but that it may mean you were making less money than had you sold the pulp directly, is that correct?

A. That is correct, yes. . . .

Q. And it made no difference to the sales volume of that division which accounting system you used?

A. Not a bit.

Q. Now, you have Exhibit 1, do you, in your hand? May I refer you to paragraph (2)? Excuse me. In reference to paragraph (8), the commissions paragraph which you previously read, the profit position under each or either of the account-

ing methods you have just described is unrelated to that, the commission which Mr. O'Reilly would receive?

A. It is unrelated as to the amount of commission he would receive. That is right." (Tr. 263-264)

It will be noted that appellant approaches the profit subject by indirection and nowhere states directly the proposition on which it necessarily rests, *viz.*, the consideration for excusing appellant from the contracted debt is that the Paperboard Division was unprofitable. To state the proposition clearly is to answer it because (1) it is a legal *non sequitur* which could not be supported by any valid argument and (2) it is factually inaccurate, there being no showing that the division was ever unprofitable.

In legal effect O'Reilly might just as well have said, "I will reduce my commission until the Lignisite Division becomes profitable."

During the course of this argument under this specification appellant makes reference to appellee's burden of proof. It will be observed that the plaintiff's complaint alleges facts which at this stage of the case are virtually *all* admitted (except that the June, 1946, contract, pleaded as being signed, is now conceded by both parties to be unsigned). This entire case is tried and appealed on the *appellant's affirmative defenses*. There ought to be no question that the burden of proof was squarely on appellant to prove by a preponderance of the evidence the allegations of its affirmative defenses, including the alleged "contract" modifying the one sued on. It was, therefore, a part of the *appellant's* case to establish that the paperboard division was un-

profitable, if that was a fact, and if it had any materiality, both of which propositions appellee denies.

Finding of Fact number X is supported by the evidence as an ultimate fact. In any event, both the question of "postponement" and the question of whether "the operation became profitable" are without significance in resolving the fundamental question of whether or not the reduction of appellee's commissions were supported by consideration. Since to omit the portion of the Finding to which error is assigned would leave the issue unaffected, appellant's claim of error is directed to a matter which is neither prejudicial nor reversible.

Argument on Appellant's Specification of Error No. 2

Here appellant argues (1) the contract was executory and (2) an executory contract can be modified as to the unexecuted portion without consideration.

A reading of the cases cited in support of appellant's position demonstrates that they fall into two categories:

1. Cases in which the contract is "executory" in the sense that the terms thereof have been agreed upon but no substantial performance has been had by either party. Such is the case in the following cases cited by appellant:

Hunters Cattle Co. v. Carstens Packing Co., 129 Wash. 377, 225 Pac. 68 (1924) ;

Inman v. Roche Fruit Co., 162 Wash. 235, 298 Pac. 342 (1931) ;

Meyer v. Strom, 37 Wn.(2d) 818, 226 P.(2d) 218 (1951) ;

Nielson v. Northern Equity Corp., 147 Wash. Dec. 155, 286 P.(2d) 1034 (1955).

2. Cases in which the contract is "executory" in that the terms have not only been agreed upon but have been partially performed and the parties agree to terminate the future performance on both sides. Such cases hold that the release of the unperformed duties of the one party will support the release of the unperformed duties of the other. Into this factual category fall the following cases cited by appellant:

LaPlante v. Hubbard, 125 Wash. 621, 217 Pac. 20 (1923);

Savage Arms Corp. v. United States, 266 U.S. 217, 69 L.Ed. 253;

Hartsville Oil Mill v. United States, 271 U.S. 43, 70 L.Ed. 822;

Mid State Prods. Co. v. Commodity Credit Corp., 196 F.(2d) 416 (7 Cir., 1952);

Abrams v. Astor, 170 F.(2d) 544 (2 Cir., 1948).

The appellee has no quarrel with the propositions suggested by either group of cases, *viz.*: (1) that where an executory contract is fully executory in that neither party has performed, it may be terminated or modified by a naked agreement to do so, and (2) where it has been partially performed on both sides it may be, by naked agreement either (a) mutually terminated as to the unperformed portion or (b) new and different conditions mutually imposed on each party for the remaining performance.

It will be noted from the cases cited by appellant, *supra*, that, although there may be some dictum that

no consideration is necessary to modify an executory contract, the cases in each instance are those in which there is *in fact* consideration. In the first category the consideration is the mutual release of each party from the obligations imposed on him by the contract. In the second category the consideration is (a) the mutual release of each party from performance of the, as yet, unperformed ("executory") portion or (b) the modifications agreed upon confer some benefit or impose some detriment upon each of the parties which, though perhaps unequal, would constitute a consideration for the modified performance.

Appellant contends that O'Reilly's employment was terminable at will and that the consideration for the reduction was the furnishing of the job. This questionable legal proposition need not be argued since it is wholly unsupported by the facts. Note that Exhibit "A" to the Complaint (Exhibit 1 in evidence), the signed contract between the Puget Sound Pulp & Timber Co. and O'Reilly, provided, *inter alia*, for a 5-year agency agreement with O'Reilly "the agency to run from the beginning of manufacture in said mill" and which, *even in the event of O'Reilly's breach*, could not be terminated by appellant until "two (2) years from the date the mill commences production" (Tr. 11-12). It is stipulated (Tr. 58, (7)) and the court found (Tr. 38, Finding IX) that the mill commenced production in May, 1947 (Tr. 78, 258, Appellant's Brief p. 3). There is no claim of breach by O'Reilly *in the 2-year period*. At the time of the "contract" allegedly modifying the previous contract (December, 1948) only 20 months had expired. It was not terminable at will at

that time, or, indeed, at any time during O'Reilly's tenure of employment. [It will be noted that, although the scrivener of Ex. "B," (Ex. 3 in evidence), in copying, omitted the "5-year agency" clause found in Exhibit "A," he did not omit the 2-year non-cancellation clause (Tr. 16-17).]

Having noted that consideration always inheres in the mutual termination of a contract which is executory in the sense that it has not been performed on either side, or in the sense that it has been partially performed on each side but is either mutually terminated or modified with a change in each party's rights and duties, we now turn to the law of Washington as it pertains to contracts partially performed on both sides where the parties "agree" that all requirements of both parties shall continue and remain in full force and effect during the remaining executory life of the contract *except that one party's benefits will be cut in half* (Tr. 96-97, 109-113, 143-144, 157, 159-160, 213, 217, 225-226, 259-260). What is the law of Washington as to that?

"The rule is elementary that neither the promise to do nor the actual doing of that which the promisor is by law or subsisting contract bound to do is a sufficient consideration to support a promise in his favor." *Allen v. Farmers & Merchants Bank*, 76 Wash. 51, 135 Pac. 621 (1913); *Keane v. Fidelity Savings & Loan Association*, 173 Wash. 199, 22 P.(2d) 59 (1933).

For cases from other jurisdictions holding that an agreement by a landlord to accept a lesser rent than that specified in the lease even when followed for an extended period by acceptance of the reduced sum and

giving receipts therefor, is void for want of consideration, see 12 Am. Jur. Contracts, Sec. 412, page 990; *Coe v. Hobby*, 72 N.Y. 141, 28 Am. St. Rep. 120; *Durband v. Nicholson*, 205 Iowa 1264, 216 N.W. 278; *Goldsborough v. Gable*, 140 Ill. 269, 29 N.E. 722, 15 L.R.A. 294.

Mosher v. Mosher, 25 Wn.(2d) 778, 172 P.(2d) 259 (1946), was a suit to recover support payments then in arrears. Defendant pleaded that the parties had made an agreement whereby plaintiff agreed to accept in the future, and for a long period of time after the agreement did accept a lesser sum than that called for by the divorce decree. In rejecting this agreement the court said:

“In the first place, if such an agreement was in fact entered into, it was void for want of consideration, on the theory that an obligation to pay a sum certain cannot be discharged by the payment of a lesser sum.”

In *Queen City Construction Co. v. Seattle*, 3 Wn.(2d) 6, 99 P.(2d) 407 (1940), the contractor entered into an agreement with the city engineer for payment for the installation of a subdrain as an extra. In a suit for the extra the city contended that the agreement to pay additional compensation was without consideration. The Court stated:

“If the respondent was not entitled to additional compensation for the installation of the subdrain, but was required to itself pay for draining the trench, the agreement between the respondent and the city engineer was without consideration and unenforceable. In 17 C.J.S., Contracts, Page 465, Section 112, the rule is stated as follows:

“ ‘The promise of a person to carry out a subsisting contract with the promisee, or the performance of such contractual duty is clearly no consideration, as he is doing no more than he was already obliged to do, and hence has sustained no detriment nor has the other party to the contract obtained any benefit. Thus, a promise to pay additional compensation for the performance by a promisee of a contract which the promisee is already under obligation to the promisor to perform is without consideration and this rule has been applied to building and construction contracts.’ ”

In support of the foregoing the court cited *Lewis v. McReavey*, 7 Wash. 294, 34 Pac. 832 (1893), and *Keane v. Fidelity Savings & Loan Assn.*, 173 Wash. 199, 22 P.(2d) 59 (1933). The latter case restates the well-known rule:

“A mere promise to do what one is by law or contract obligated to do is not a good consideration for a promise to pay.”

To the same effect as the *Queen City Construction Co.* case is *Westland Construction Co. v. Chris Berg, Inc.*, 35 Wn.(2d 824, 215 P.(2d) 683 (1950), wherein the court stated:

“Since it is found that the plastering work required was contemplated by the original contract, the trial court was correct in finding that there was not a subsequent agreement on August 14, 1946, which renders the original agreement unenforceable. In any event, such a subsequent agreement would be void because without consideration.”

For an excellent exposition of the subject see *Harris v. Morgenson*, 31 Wn.(2d) 228, 196 P.(2d) 317 (1948).

There is no evidence which establishes the existence

of a new contract between appellant and appellee under the terms of which the appellee agreed that the appellant should be fully *discharged of its duty to pay the 3% commission*. To the contrary, the evidence clearly establishes, and the court found, that appellant's duty and obligation to pay the 3% was a continuing obligation for the life of the contracts. Further, the evidence does not sustain a position that remittances of commissions made by appellant during the period involved, January, 1949, to March 1, 1952, were intended by appellee to be in modification of, or in full payment of, commissions which appellant was required to pay under the agency agreements involved.

The mere payment by appellant of the 1½% instead of the 3% commissions, and the acceptance thereof by the appellee does not release the appellant of the duty and obligation to pay the full 3% as there is an absence of consideration therefor.

“Where a debtor pays what, in law, he is bound to pay, and what he admits he owes, such payment by the debtor and its acceptance by the creditor, even if tendered as payment in full of a larger indebtedness cannot operate as an accord and satisfaction of the entire indebtedness, *as there is an absence of consideration therefor.*” *Bellingham Securities Syndicate, Inc., v. Bellingham Coal Mines, Inc.*, 13 Wn.(2d) 370, 125 P.(2d) 668 (1942); *Seattle Investors Syndicate v. West Dependable Stores*, 177 Wash. 125, 30 P.(2d) 956 (1934).

Argument in Answer to Specification of Error No. 3

Appellant here argues that (1) an accord and satisfaction arose out of the discussions between O'Reilly and appellant wherein O'Reilly wanted to terminate his

employment effective December 31, 1952, while Turcotte was suggesting August 31, 1951, and the parties agreed on February 29, 1952 (leap year) and (2) that appellee is estopped from "repudiating his agreement."

This argument does considerable torture to the discussions between O'Reilly and Turcotte. They discussed only the subject of how long appellant would continue receiving checks, whether until August 31, 1951, or December 31, 1952. They agreed on February 29, 1952 (Tr. 98-101, 122-131). The only accord reached was as to a *termination date* of O'Reilly's employment. The court observed the two witnesses to this transaction and from their testimony found that they

"orally stipulated and agreed that the services of plaintiff should terminate as of February 29, 1952. The court finds that such agreement of July, 1951, was not, nor was it intended by the parties to be, an accord and satisfaction of any of defendant corporation's indebtedness to plaintiff under said contracts Exhibits 'A' and 'B.' Furthermore, the court finds that no consideration was promised to plaintiff or received by plaintiff to support any alleged accord and satisfaction or mutual release either at this time or any previous or later time from the inception of said contracts to and including February 29, 1952; . . . " (Finding XI, Tr. 39-40)

The Court further found (Tr. 41, Finding XIII) that there was no meeting of the minds nor any intent by either of the parties to indulge in an accord and satisfaction of Appellant's obligations under Exhibits "A" and "B" and that appellant failed to sustain the

burden of proof in this regard. There is ample evidence to support both findings (Tr. 98-101, 117, 120, 122-131, 228-238, 281-283, Ex. A-1).

To the extent that there is a conflict in the evidence as to the conversations between O'Reilly and Turcotte, such conflict should be resolved in favor of the appellee. *Bach v. Friden Calculating Machine Co.*, 155 F.(2d) 361 (9 Cir., 1946) ; *Paramount Pest Control Service v. Brewer*, 177 F.(2d) 564 (9 Cir., 1949) ; *Grace Bros. v. C.I.R.*, 173 F.(2d) 170 (9 Cir., 1949) ; Rule 52, Federal Rules of Civil Procedure.

There cannot be an accord and satisfaction unless there was a dispute, and an agreement to settle it.

“Accord and satisfaction is founded on contract, and a consideration therefor is as necessary as for any other contract. One rule of law with reference to accord and satisfaction, which has been adopted by this court, is that if a claim of indebtedness is liquidated and undisputed, and is due and owing, payment by the debtor and receipt by the creditor of any amount of money less than the whole amount of the indebtedness will not discharge the balance and this is true even though at the time of making the payment, the debtor announced that he intended thereby to pay in full the entire indebtedness. The reason for this rule is that there is no contract and no consideration because the debtor was in law bound to pay in full that which he admits he owes. *Plymouth Rubber Company v. West Coast Rubber Company*, 131 Wash. 662.” *Plotkin v. Green*, 36 Wn.(2d) 253, 217 P.(2d) 610 (1950).

The only dispute between O'Reilly and Turcotte was as to a termination date (Tr. 101, 117, 120, 122-124, 228-238, 281, 283, Ex. A-1). The only possible deviation

from that is Turcotte's remark (Tr. 232) in response to questions from his counsel,

"I finally made him the proposal that there was no question as to his termination date as an employee of Puget to be September 1, 1951, but that we would pay him at the same rate of one and one-half per cent commission from September 1, 1951, to February 29, 1952." (Tr. 232)

"Q. Will you state the substance of what, if anything, Mr. O'Reilly said in response to your proposal? . . .

A. Well, as I remember, Mr. O'Reilly repeatedly stated that he was not fairly treated. After my proposal to him he said something like: 'I guess that is it'; and got up and left." (Tr. 234)

These were hardly words of acceptance of a proposal. But even to the extent they were, they could not settle anything except the dispute then under discussion. That is, they could settle no more than O'Reilly's compensation for the period September 1, 1951, to February 29, 1952, at one and one-half per cent. However, in this regard it will be remembered that O'Reilly's contract with appellant (Exhibit A, Tr. 8) contemplated a "5-year agency agreement." The five years commenced May, 1947, and would not terminate until May of 1952 (Tr. 258). Again comes the question—is there any consideration for O'Reilly's alleged "promise" to accept less than 3% for any period *prior to May, 1952*? It will be noted that *appellant* agreed to a five-year agency (Ex. "A") whether or not *Bellingham Paper Products Co.* did (Ex. "B"). The parties considered they had a five-year contract (Tr. 236).

Appellant, in support of its accord and satisfaction

argument, contends that O'Reilly was not obligated to do any selling after September 1, 1951, and did not. Hence, it is argued, he is relieved from September 1, 1951, of his obligations under the contract. But, the record shows that O'Reilly testified in detail that he performed his regular duties, at all times including the period from September 1, 1951, to and including February 29, 1952 (Tr. 124). The independent witnesses, Emmons and Frankel, likewise so testified by deposition (Tr. 157-170-211). The court accepted this view of the facts and the factual issue was decided in the court below in favor of appellee (Tr. 39-41; Finding XI, XII, XIII and XIV).

Appellant is in the dubious position of contending that the result of the July, 1951, conversations was an agreement by O'Reilly to take $11\frac{1}{2}\%$ from *January 1, 1949*, to February 29, 1952, in consideration of appellant paying him such rate for the period September, 1951, to February 29, 1952, when, in fact, no testimony or any other portion of the record discloses any such agreement. Furthermore, it is a legally untenable proposition as the case of *Bellingham Securities Syndicate v. Bellingham Coal Mines*, 13 Wn.(2d) 370, 125 P.(2d) 668 (1942) establishes. It should be noted in passing that the *Bellingham* case is cited not only in answer to the argument of appellant on accord and satisfaction but on estoppel and consideration.

In that case the agreement provided that the lessor should receive a royalty of $12\frac{1}{2}$ cents per ton of coal mined by the lessee plus 25% of the net profits of the operation pursuant to a formula for its determination.

For 21 years plaintiff accepted 12½ cents per ton and in addition approximately \$283,000 in distribution of profits for about 15 of the 21 years. Plaintiff sued for some \$83,000 claiming to be that much underpaid on profit distribution. Defendant claimed an accord and satisfaction and estoppel since plaintiff was furnished periodic statements with each royalty payment and failed over a great many years to make any claim for any amounts in excess of those received. The trial court dismissed the complaint.

In reversing the trial court the Supreme Court of Washington said,

“To create an accord and satisfaction in law there must be a meeting of minds of the parties on the subject and intention on the part of both to make such an agreement (citing cases) * * * It must be remembered that an accord and satisfaction is founded on contract and consideration therefor is as necessary as for any other contract * * * Where a debtor paid what in law he is bound to pay and what he admits he owes, such payment by the debtor and its acceptance by the creditor, even if tendered as payment in full of a larger indebtedness cannot operate as an accord and satisfaction of the entire indebtedness as there is an absence of consideration therefor. (citing cases)

“The affirmative defense of estoppel was also pleaded by respondent whose counsel insists that, having either actual or constructive knowledge of the facts, appellant induced respondent by its conduct to believe that appellant acquiesced in or ratified the monthly transactions between the parties; that having induced respondent who had a right to rely upon such conduct appellant may not

now alter tis position but is estopped from repudiating the transaction to the prejudice of the respondent * * *

“Respondent may not successfully urge, in support of its affirmative defense of estoppel, that it was misled by appellant’s receipt of reports and royalty payments without objection. It should be borne in mind that respondent knew, as well as appellant, what the terms of the lease were; hence, where parties have equal means of knowledge there can be no estoppel in favor of either. *Wilkinson v. Leberman*, 327 Mo. 420, 37 S.W.(2d) 533.

“Respondent has not changed its position in reliance upon any of the alleged representations of appellant. Respondent did not make any expenditures in developing and equipping the mine which it was not obligated to make under the terms of the lease. The only detriment which the respondent will suffer by having to pay the royalty due is that entailed in performance of its obligation under the lease to pay royalty. *The mere failure to pay what one owes is not a change of position which will support an estoppel* * * *

The claim of estoppel is wholly without merit. The claim of an accord and satisfaction presupposes that there was a full understanding and meeting of the minds that O’Reilly would be paid 1½% for six months for doing nothing in consideration of his waiving his claim for 1½% for the preceding 32 months. Nowhere in the record can be found any such agreement. The record repeatedly shows that the parties negotiated with each other on the sole subject of an expiration date. They agreed on February 29, 1952. There was no disputed claim for past-due commissions being presented for settlement.

“(1) An accord is an agreement for the settlement of a claim by some performance other than that which is due, and is governed by the principles of contract, *Graham v. New York Life Ins. Co.*, 182 Wash. 612, 47 P.(2d) 1029 (1935), and cases cited. To create it, there must be a meeting of the minds upon the subject and an intention by both parties to make such an agreement. *Meyer v. Strom*, 37 Wn.(2d) 818, 226 P.(2d) 218 (1951).

“(2) The mere receipt by respondent of an amount less than is claimed, with the knowledge that appellants admit an indebtedness only to the extent of the payment made, does not of itself establish an accord and satisfaction. When a remittance is made, which is less than the amount in dispute, *it must be made plain to the creditor* that the remittance is tendered as full payment of the disputed amount. If it is so accepted, then there is an accord, and the remittance discharges the entire obligation. *Three Rivers Growers' Ass'n. v. Pacific Fruit & Produce Co.*, 159 Wash. 572, 294 Pac. 233 (1930); Restatement, Contracts, Sec. 420, Comment (a) Illustration 5.

“(3) The facts of the instant case do not meet this test. As was said in *Ingram v. Sauset*, 121 Wash. 444, 447, 209 Pac. 699, 34 A.L.R. 1031 (1922):

“ ‘The fallacy of appellants’ position lies in this: first, whatever Sauset’s intention, the check was not offered in full satisfaction of the demand, though respondent thought that Sauset intended or hoped it would be so accepted; no conditions accompanied it and there was nothing to indicate that it might not, in the event that the payee declined to accept it as full payment, be applied on account and further negotiations be had as to remainder

of the claim. Second, there is nothing in the record to indicate that respondent accepted the check as full payment'." *Boyd-Conlee Co. v. Gillingham*, 44 Wn.(2d) 152, 266 P.(2d) 339 (1954).

Appellant argues further that performance under the July, 1951, termination agreement precludes raising the question of consideration. We challenge more than the consideration. There is no evidence that any agreement settling appellee's present claim was ever reached.

On the question of estoppel, we point out that there exists in Washington a rule of law first announced in the early cases of *Evans v. Ore. & Wash. R. Co.*, 58 Wash. 429, 108 Pac. 1095, 28 LRA (NS) 455 (1910) and *Conlan v. Spokane Hardware Co.*, 117 Wash. 378, 201 Pac. 26 (1921), that where the obligor is or becomes financially incapable of performance of his obligation, an agreement to accept a lesser sum is binding and enforceable. This is a rule of necessity. Such is the case in *Vigelius v. Vigelius*, 169 Wash. 190, 13 P.(2d) 425 (1932), and *Douglas County Mem. Hosp. Assn. v. Newby*, 45 Wn.(2d) 784, 278 P.(2d) 330 (1954), cited by appellant. There was no showing that appellant was incapable of performing its contractual obligation to appellee, so as to bring appellant within the purview of the cases relied on by appellant.

The estoppel for which appellant contends requires a showing that appellant has somehow changed his position *to his detriment* in reliance on the "modified" agreement. It is only on this basis and only under those special circumstances that the cases cited by appellant hold that the performance of a modified agreement

estops a challenge to its consideration. Such is the holding of *Reynolds v. Travelers Ins. Co.*, 176 Wash. 36, 28 P.(2d) 310 (1934); *Bowman v. Webster*, 44 Wn.(2d) 667, 269 P.(2d) 960 (1954); and *Mall Tool Co. v. Far West Equip. Co.*, 45 Wn.(2d) 158, 273 P.(2d) 652 (1954), cited by appellant.

There has never been any change in position by appellant which could form the basis for any estoppel. *Bellingham Securities Syndicate v. Bellingham Coal Mines, supra*.

Before leaving the subject of accord and satisfaction we note that appellant makes reference in this regard, in its brief, to O'Reilly's

“ * * * concealment of the fact that he claimed the right to additional compensation.” (Brief, p. 13) and further at page 30:

“It is important to note that appellee himself did not testify that he disclosed to appellant any claim to recover commissions at the original rate, in the negotiations leading to his termination, or at any time prior to writing his letter of June 5, 1953. (Ex. A-6).”

And further to O'Reilly's “secret intentions” (pp. 33-34).

We fail to understand how there can be a “meeting of the minds upon the subject and an intention by both parties to make such an agreement” (*Boyd-Conlee Co. v. Gillingham, supra*, cited by appellant) when the thing being “settled” is “concealed” or “secret” or not “disclosed” by the parties. It must be conceded that, despite the present wish of appellant to the contrary, the subject of appellee's claim for *unpaid* com-

pensation was neither discussed nor compromised by the agreement of July, 1951. The best evidence of this is Turcotte's own admission that O'Reilly's claim for past commissions was not presented or discussed (Tr. 234).

We cannot square with logic appellant's assertion that O'Reilly's claim was "undisclosed" and "secret," with its citation of the following from 12 Am. Jur. 516, Contracts, Sec. 19 (Brief, p. 32):

"It is said that the meeting of minds which is essential to the formation of a contract is not determined by the secret intentions of the parties, but by their expressed intentions which may be wholly at variance with the former."

There can certainly be no dispute with the law cited. It supports appellee's view that there can be no contract of accord and satisfaction without a meeting of the minds and a specific mutual intention to settle a disputed claim. Both of these elements necessary to effect an accord and satisfaction are lacking in the case at bar. Appellant failed to sustain the burden of proof of such an agreement (Finding XI, XIII and XIV, Tr. 39-41).

Argument on Appellant's Specification of Error No. 4

It is here contended that Ex. B was (1) unsigned, (2) could not be performed within one year and (3) was therefore void under R.C.W. 19.36.010, the Washington Statute of Frauds.

First it will be remembered that, under Specification of Error No. 2, appellant, there contending there was consideration for the alleged "modification agreement" of December, 1948, asserted that the agreement (Ex. "B") was terminable at will.

“The appellant had the privilege of discharging the appellee at any time had it chosen so to do, but instead relied in good faith upon the modification for over three years.

“It must be remembered that the terms of Exhibit 3 do not specify the duration of that agreement. The parties did not incorporate a five-year period in Exhibit 3 as they had stated they would do in Exhibit 1. Paragraph 5 of Exhibit 3 clearly states that that agreement contains all of the terms of the agreement. So we have a contract for personal services without a termination date. Such contracts are terminable at the will of either party.” (citing cases) (Appellant’s brief, p. 25)

It is now contended that it cannot be performed within a year.

“It is next urged that the contract, not being in writing, violates Rem. Rev. Stat., Sec. 5825 (1) [P.C. Sec. 7745], providing that agreements not to be performed within one year from the making thereof must be in writing, signed by the party to be charged therewith. Under the facts of this case, however, the statute has no application. The contract was not only made for an indefinite length of time, but was terminable at will. Consequently, it could have been performed at any time after its inception, or terminated within the duration of a year at the will of either party. We have held that in such cases the statute does not apply. *Dent Lbr. & Shingle Co. v. Cedarhome Lbr. Co.*, 141 Wash. 593, 252 Pac. 141; *Barash v. Robinson*, 142 Wash. 118, 252 Pac. 680; *Peabody v. Pioneer Sand & Gravel Co.*, 164 Wash. 26, 2 P.(2d) 714; *Von Herberg v. Von Herberg*, 6 Wn.(2d) 100, 106 P.(2d) 737; *Sargent v. Drew-English, Inc.*, 12 Wn.(2d) 320, 121 P.(2d) 373 (1942).

See also *Davis v. Alexander*, 25 Wn.(2d) 458, 737." *Sargent v. Drew-English, Inc.*, 12 Wn.(2d) Wn.(2d) 710, 237 P.(2d) 1026 (1951).

In any event the Statute of Frauds cannot be employed to challenge the validity of an agreement which has been fully performed. *Maze v. Feuchtwanger*, 106 W. 327, 179 Pac. 850 (1919).

The issue is further foreclosed by appellant's failure to plead the Statute of Frauds as a defense. It must be pleaded. *Moses Land Scrip & Realty Co. v. Stack-Gibbs Lbr. Co.*, 56 Wash. 529, 106 Pac. 207 (1910); *Seattle Taxicab & Transfer Co. v. Kinney*, 74 Wash. 179, 132 Pac. 1013 (1913); *First Natl. Bank v. Gerke*, 85 Wash. 477, 148 Pac. 593, Am. Cas. 1917 B 564 (1915); *Miller v. O'Brien*, 17 Wn.(2d) 753, 137 P.(2d) 525 (1943).

A general denial to a plea of contract will raise the issue. *Goodrich v. Rogers*, 75 Wash. 212, 134 Pac. 947 (1913); *Marshall v. Hillman Inv. Co.*, 151 Wash. 529, 226 Pac. 564 (1929). This, because a general denial denies *the existence of a contract*. But here, appellant not only in the pleadings (Tr. 19, 20) and at the trial (Tr. 71-74, 91) but in this court by stipulation (Tr. 58) admits that Ex. B represents the precise contract between the parties, but simply denies the signatures. The contention in the pleadings and at the trial that it was unsigned was in support of the 7th affirmative defenses of the Statute of Limitations applicable to oral contracts (Tr. 27).

Thus, there is no denial of a contract but an admission there is one. The denial of signatures does not constitute a plea of the statute which is a plea that there is no contract. The denial of signatures enabled appellant

to plead the Statute of Limitations and could serve no other purpose.

As pointed out in appellant's brief, the Washington Statute of Frauds, R.C.W. 19.36.010, does not require that the *contract* be in writing and signed to satisfy the Statute. It merely requires that "some note or memorandum thereof, is in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." Is there a memorandum of appellant's promise to pay appellee 3% signed by appellant?

At the outset it will be remembered that appellant's promise is also contained in Exhibit "A," signed by appellant and appellee, and formally adopted, ratified and confirmed in *haec verba*, by appellant's Board of Directors(Exhibit 9, Tr. 89). Pursuant to sub-paragraph (8) of Exhibit "A" appellant agreed with appellee to form Bellingham Paper Products Co., which, when organized, would enter into a five-year Agency Agreement with O'Reilly to pay him 3% of net sales (Tr. 11-12).

Pursuant to sub-paragraph (8) of Exhibit "A," appellant did organize the subsidiary, did enter into a contract with appellee to pay him 3% of net sales, and the subsidiary did, in fact, pay the 3% during its corporate existence. As heretofore indicated there is no dispute that Exhibit "B" is the contract between appellee and Bellingham Paper Products Co. Observe here that we are not concerned with whether Bellingham Paper Products Co. signed Exhibit "B," since that company is not the party sought to be charged. Appellant's argument is misleading on this point. What is important

is that after the preparation of Exhibit "B," the following transpired: Bellingham Paper Products Co., by its Board of Directors, adopted, ratified and confirmed the Agency Agreement (Exhibit 5, Tr. 76). We now take it to be the contention of the appellant that these minutes are unsigned (Appellant's Brief 41), although no reference is made by appellant to any portion of the record so indicating. It will be recalled that these are photostatic extracts prepared by appellant and admitted by stipulation (Tr. 33). However, in view of what transpired afterwards, it makes little difference whether either Exhibit "B" or the minutes were signed by Bellingham Paper Products Co.

When Bellingham Paper Products Co. was liquidated the *appellant*, in writing, and over the signatures of its officers (Ex. 10), agreed with the liquidating trustees of Bellingham Paper Products Co. to "a transfer of all interest of Bellingham Paper Products Co. in and to its Agency Agreement with Joe A. O'Reilly," and further provided "Puget Sound Pulp and Timber Co. further assumes and agrees to pay and discharge all liabilities of Bellingham Paper Products Co." (Exhibit 10; Tr. 89-91). At the time of its admission in evidence, counsel stipulated that Exhibit 10, when referring to the "Agency Agreement," referred to Exhibit "B" (Tr. 90). When it is recalled that Exhibit "A" is in writing, signed by appellant; that Exhibit "B" is a specific contract in writing, and is adopted and assumed by appellant by a signed contract, and that there is no dispute or quarrel as to the terms of the Agency Agreement, the requirement of the Statute of Frauds that "some note or memorandum thereof is in writing

and is signed by the party to be charged therewith" is clearly met.

CONCLUSION

Without re-stating all of appellee's answers in detail to the arguments of appellant, the following pertinent events occurred in the relationship between appellant and appellee:

In May, 1946, by Exhibit "A," the parties agreed that a partially owned subsidiary of appellant would be organized, which subsidiary would enter into a five-year Agency Agreement with appellee pursuant to which he could be paid three per cent of the net sales of the subsidiary, the five-year period to commence with production in the mill, which later developed to be May, 1947.

After the organization of the subsidiary, appellee was in fact employed by the subsidiary and paid the three per cent of net sales during the corporate existence of the subsidiary. This was pursuant to a written Agency Agreement, Exhibit "B" and the original contract between the parties, Exhibit "A."

Appellee, prior to any of the events hereinafter noted, was a man of broad experience and qualification in the paperboard and carton business, earning a substantial income in the neighborhood of \$40,000.00 a year (Tr. 147). The contracts and agreements are not typical employment agreements in that O'Reilly conceived the entire idea of appellant's going into production of paperboard, and, in addition thereto, substantially contributed to the risk capital of the venture by both cash and equipment. He was the sole person qualified to work out the initial problems of the establishment of the mill,

the establishment of grades, the determination of the needs of possible future customers, the construction of the plant, the purchase of the very large and complicated machinery, and the supervision of its installation (Tr. 65-94, 153-159). The suggestion in appellant's brief that appellee is a mere salesman whose commissions were dependent on sales made *by him*, is false. Appellee was, in all respects, an executive whose compensation was geared to net sales. Here the similarity between his function and that of a salesman ends.

Exhibit "A" was adopted by the Board of Directors of appellant, Exhibit "B" was adopted by the Board of Directors of the subsidiary.

When it became expedient, in December, 1947, to liquidate the subsidiary, appellant purchased appellee's stock, and, in accordance with standard procedure for the liquidation of corporations, the liquidating stockholder, to-wit, appellant, agreed in writing in a document signed by appellant, to take over the contract with O'Reilly, Exhibit "B," and assume all the liabilities and obligations of its subsidiary, including the one just referred to. It will be remembered that at this juncture (December, 1947) and for more than a year thereafter, appellant paid appellee the three per cent commission stipulated in both Exhibits "A" and "B."

Commencing in January, 1949, and each month for the balance of appellee's employment with appellant, down to and including February 29, 1952, appellee was paid one and one-half per cent of net sales instead of the three per cent provided in the contracts referred to (Tr. 94-95). It is without dispute in the testimony that

the obligations, duties and actual conduct of O'Reilly, after January 1, 1949, was identical, in every respect, with his obligations, duties and conduct prior to that time. It is further without dispute in the testimony that the obligations, duties and performance of the appellant were identical in every respect subsequent to January 1, 1949, to that prior thereto, *with the sole exception of the amount of compensation paid appellee by appellant* (Tr. 97, 159-160, 225-226, 259). This presents the classic case of an "agreement" by appellee to carry out a subsisting contract with appellant for which appellant "agrees" to pay him $\frac{1}{2}$ of what it is already bound to pay which the courts uniformly hold to be without consideration and void.

The claim of appellant that the subsisting contracts of appellee with appellant were "modified" was a matter raised as an affirmative defense by the appellant, and upon which the court found a complete failure of proof, which finding was amply supported by the evidence.

In July, 1951, appellant opened the subject of a mutual termination date for appellee's employment. Appellant, through Turcotte, proposed a termination date of September 1, 1951. Appellee, on the other hand, proposed a termination date of December 31, 1952. After exchange of correspondence, and conversation, the parties agreed on February 29, 1952 as a termination date. There is no question but that the parties mutually terminated the agreement as of that date.

Appellant, however, seeks by affirmative defense, to contend that the parties in fact agreed that in consid-

eration of appellee receiving one and one-half per cent of net sales from September 1, 1951, through February 29, 1952, appellee surrendered all claim for the remaining one and one-half per cent unpaid from January 1, 1949, to September 1, 1951. As clearly appears from the record, no such agreement was discussed, and the court found that there was neither a meeting of the minds on the subject of O'Reilly's past-due commissions, nor was there any intent to settle any dispute between the parties other than the effective date of his termination with appellant.

From the entire record it is abundantly clear that the trial court, which had the witnesses before it, and being in a position to weigh the conflicts in the evidence presented by the respective parties, found that appellee's version of the foregoing events, covering a period of some six years, was correct.

We respectfully submit that, with the exception of the interest question hereinafter presented, the Findings and Judgment of the trial court are amply supported by the evidence, and should be affirmed.

BRIEF ON CROSS-APPEAL

No additional statement of the case is necessary to present the issue raised by the Cross Appeal.

QUESTION INVOLVED

Where there was never any dispute as to the amount of net sales but the only dispute is as to the percentage thereof payable to appellee by appellant, the appellee contending that he is entitled to 3% thereof and ap-

pellant contending that percentage to be $1\frac{1}{2}\%$ and it being undisputed that appellant's indebtedness to appellee, exclusive of interest, was either \$59,572.04 in accordance with Ex. C attached to the Findings (Tr. 43-45) (Exhs. 6, 11 and A-8 in evidence) or it was nothing, should the judgment for appellee have included interest at 6% on each monthly amount from the respective dates they accrued?

The trial court said "No."

SPECIFICATION OF ERROR

The trial court's striking, on its own motion, the following language from Cross Appellant's proposed Conclusions of Law (Tr. 43) and equivalent language in the Judgment (Tr. 46), to-wit:

" * * * together with interest at 6% per annum until paid on each unpaid monthly amount which became due him as the same accrued in accordance with Exhibit "C" attached hereto, commencing with the 1st day of February, 1949, and on each installment thereafter up to and including the installment due plaintiff for the month of February, 1952 * * * "

is clearly erroneous.

ARGUMENT

There was no dispute at any time that Exhibits 6 and 11 are the originals of the statements that Bellingham Paper Products Co. and appellant prepared each month and furnished to appellee each month with his check. O'Reilly never disputed the net sales figure either at the trial, here or elsewhere. In fact, appellant prepared a summary of all monies paid appellee which

went into evidence by Stipulation (Tr. 32) containing the same figures.

There can be no question that the claim of appellee was a liquidated claim.

The law of Washington is very liberal in allowing interest not only on liquidated claims but on unliquidated claims when the amount thereof is capable of ascertainment by computation. *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381 (1910); *Dornberg v. Black Carbon Coal Co.*, 93 Wash. 682, 161 Pac. 845 (1916); *Lloyd v. American Can Co.*, 128 Wash. 298, 222 Pac. 876 (1924); *Barbo v. Norris*, 138 Wash. 627, 245 Pac. 414 (1926); *Woodbridge v. Johnson*, 187 Wash. 191, 59 P.(2d) 1135 (1936); *Hill v. Brandes*, 1 Wn.(2d) 196, 95 P.(2d) 382 (1939); *Ryan v. Plath*, 20 Wn.(2d) 663, 148 P.(2d) 946 (1944); *U.S. v. Skinner & Eddy Corp.*, 28 F.(2d) 373, modified 35 F.(2d) 889, certiorari dismissed 281 U.S. 770, 50 S.Ct. 248, 74 L.Ed. 1176 (1930-9 Cir.).

When payments become due in installments, the obligor becomes liable for 6 per cent interest on each installment from its due date. *Benner v. Billings*, 107 Wash. 1, 181 Pac. 19 (1919).

The foregoing law applies to employment contracts. *Herman v. Golden Arrow Dairy*, 191 Wash. 582, 71 P.(2d) 581 (1937); *Woodbridge v. Johnson, supra*.

The Washington court has held that it was reversible error to disallow interest on deferred payments. *Berol v. Berol*, 37 Wn.(2d) 280, 223 P.(2d) 1055 (1950).

This court has long recognized the substantive law

of Washington on the allowance of interest. *U. S. v. Skinner & Eddy Corp.*, *supra*; *Hansen & Rowland v. C. F. Lytle Co.*, 167 F.(2d) 170, rehearing denied 167 F.(2d) 998 (1948).

In *Malcolm v. Yakima County Consolidated School District No. 90*, 23 Wn.(2d) 80, 159 P.(2d) 394 (1945), the court held invalid a provision in a teacher's contract requiring the teacher to pay \$40.00 a month rent for living quarters. There, as here, there was no dispute as to the monthly amount, only the question of liability was in dispute. The court held interest was recoverable on each monthly payment as it accrued. The court said:

“ * * * The cause of action rests upon the written contracts, it follows that interest is recoverable upon the unpaid balances from the time they were due. See *Rhodes v. Tacoma*, 97 Wash. 341, 166 Pac. 647.”

The subject of interest was never discussed or presented until Findings were presented, at which time no exceptions to the proposed language in the Findings and Judgment were taken. The court, on its own motion, after hearing other objections to the form of Findings and Judgment, simply announced the court was striking the provision for interest. We respectfully submit that the court's deletion of the interest award from the Conclusions of Law and Judgment is clearly erroneous and that the Conclusions and Judgment should be amended to restore the deleted language.

The judgment of the trial court should be affirmed on appellant's appeal and modified on appellee's cross-appeal to award interest in accordance with the foregoing.

Respectfully submitted,

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No. 14906

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a corporation,

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vs.

JOE A. O'REILLY,

Appellee.

JOE A. O'REILLY,

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PUGET SOUND PULP AND TIMBER Co.,
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Cross-Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
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HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF APPELLANT
BRIEF OF CROSS-APPELLEE

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INDEX

| | <i>Page</i> |
|---|-------------|
| REPLY BRIEF OF APPELLANT..... | 1 |
| Statement of the Case..... | 1 |
| Appellee's Breach of Contract..... | 1 |
| Reply Argument on Specification of Error No. 1 | 3 |
| Reply Argument on Specification of Error No. 2 | 3 |
| Reply Argument on Specification of Error No. 3 | 13 |
| Reply Argument on Specification of Error No. 4 | 19 |
| Conclusion | 20 |
| BRIEF OF CROSS-APPELLEE | 21 |
| Argument | 21 |

TABLE OF CASES

| | <i>Page</i> |
|---|-------------|
| <i>Allen v. Farmers & Merchants Bank</i> , 76 Wash. 351, 135 Pac. 621 (1913) | 9 |
| <i>Austin v. Union Lumber Company</i> , 95 Wash. 608, 164 Pac. 245 (1917) | 16 |
| <i>Bellingham Securities Syndicate, Inc. v. Bellingham Coal Mines., Inc.</i> , 13 Wn. (2d) 370, 125 P. (2d) 668 (1942) | 13, 18 |
| <i>Harris v. Morgensen</i> , 31 Wn. (2d) 228, 196 P. (2d) 317 (1948) | 10 |
| <i>Herman v. Golden Arrow Dairy, Inc.</i> , 191 Wash. 582, 586, 71 P. (2d) 581 (1937) | 17 |
| <i>Herzog v. Herzog</i> , 23 Wn. (2d) 382, 387, 161 P. (2d) 142 (1945) | 22 |
| <i>Hunter's Cattle Co. v. Carstens' Packing Co.</i> , 129 Wash. 377, 225 Pac. 68 (1924) | 7 |
| <i>Ingram v. Sauset</i> , 121 Wash. 444, 209 Pac. 699 (1922) | 18 |
| <i>Keane v. Fidelity Savings & Loan Association</i> , 173 Wash. 199, 22 P. (2d) 59 (1933) | 9 |
| <i>LaPlante v. Hubbard</i> , 125 Wash. 621, 217 Pac. 20 (1923) | 8 |
| <i>Meyer v. Strom</i> , 37 Wn. (2d) 818, 226 P. (2d) 218 (1951) | 7 |
| <i>Mid-State Products Co. v. Commodity Credit Corp.</i> , 196 F. (2d) 416 (7th Cir. 1952) | 8 |

TABLE OF CASES (Cont.)

| | <i>Page</i> |
|--|-------------|
| <i>Mosher v. Mosher</i> , 25 Wn. (2d) 778, 172 P. (2d) 259 (1946) | 9 |
| <i>Neilson v. Northern Equity Corp.</i> , 147 Wash. Dec. 155, 286 P. (2d) 1034 (1955) | 7 |
| <i>Queen City Construction Co. v. Seattle</i> , 3 Wn. (2d) 6, 99 P. (2d) 407 (1940) | 11 |
| <i>Seattle Investors Syndicate v. West Dependable Stores</i> , 177 Wash. 125, 30 P. (2d) 956 (1934) | 13 |
| <i>Washington Fish & Oyster Co., Inc. v. G. P. Halferty & Co., Inc.</i> , 44 Wn. (2d) 646, 269 P. (2d) 806 (1954) .. | 22 |
| <i>Westland Construction Co. v. Chris Berg, Inc.</i> , 35 Wn. (2d) 824, 215 P. (2d) 683 (1950) | 11 |
| <i>Yanoscheck v. Montgomery Ward & Co.</i> , 176 Wash. 137, 28 P. (2d) 270 (1934) | 18 |

TEXTS

| | <i>Page</i> |
|--|-------------|
| 12 Am. Jur., "Contracts," Sec. 19, p. 516 | 17 |
| Restatement of Contracts, Sec. 416 | 12 |
| 3 Williston on Contracts (Rev. Ed.), Sec. 681, p. 1967.... | 17 |

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REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASE

Appellee's Breach of Contract

With respect to appellee's contention (Br. 1-2)
that the organization of California Paperboard Cor-

poration by O'Reilly and its manufacture and sale of paperboard products would not be a breach of his contract with appellant, the record is clear that the activity contemplated by and actually carried on by O'Reilly amounted to a substantial breach of his contract. The agreement obligated O'Reilly not to "undertake or promote the sale or sales of like, similar or competing commodities . . ." (Ex. 3, Tr. 18).

By O'Reilly's own testimony, California Paperboard produced some products identical with those of appellant (Tr. 118-19). After one of appellant's customers invested \$40,000 in California Paperboard to obtain "a second source of supply" for lettuce pads which had been obtained from appellant, O'Reilly solicited appellant's customer to divert orders from appellant to California Paperboard (Tr. 173, 182, 183).

The clearest evidence of O'Reilly's breach of the contract is contained, however, in his own letter of July 12, 1951, in which he wrote appellant's president in part as follows (Ex. A-1) :

"Customers, grades and areas have been selected to avoid a competitive impact when new production, either by Container's new Los Angeles machine or California Paperboard in Richmond, comes into the field. This is the result of advance planning going back to last fall and winter.

* * *

"We are not shipping very much to former

large California customers who will be customers of California Paperboard."

By his own admission O'Reilly, as early as the fall of 1950, was conducting appellant's sales program in a way to avoid "competitive impact" with his own mill when it began production.

Furthermore, appellant had the right under the contract to discharge appellee if his work was unsatisfactory at any time after May, 1949, even if the contract be held one for a five-year period (Ex. 3, Tr. 14, 15-16).

REPLY ARGUMENT ON SPECIFICATION OF ERROR NO. 1

Under this argument appellant contends that the trial court's Finding of Fact No. X that "plaintiff temporarily reduced his commission in December 1948 or January 1949 and postponed collection of the remainder" was clearly erroneous. Appellee's brief concedes that this finding is "a conclusion of mixed fact and law" (Br. 4) and that neither O'Reilly nor Roberge, the two parties to the conversation in which the reduction was discussed, used language of postponement. The "ultimate fact" that only the collection of the balance was to be postponed is claimed to be supported by record references. None of the record references cited by appellee contains any evidence which would support the finding that O'Reilly postponed collection of

the balance of $1\frac{1}{2}\%$ of his commission. No permissible interpretation of appellee's words or conduct in any way supports this finding.

Appellee also attempts to discount O'Reilly's own testimony that the reduction would be "until the operations became profitable" as being "without legal significance" (Br. 4). Of course, O'Reilly's compensation was *measured* by sales and not by profit, but O'Reilly himself thought there was a sufficient relationship between his compensation and the profit or loss of the Paperboard Division to reduce his commissions until "the operations became profitable." (Tr. 97) In his letter of June 5, 1953, when he first disclosed his claim to recover additional compensation going back to January, 1949, he wrote as follows:

"You may recall that I voluntarily suggested that I take $1\frac{1}{2}\%$ or half of the agreed amount starting January 1, 1949, '*until the operation became profitable*'."

"It is my considered opinion that your records, and/or an independent audit, will disclose the fact that the board mill operation was profitable for the major portion, if not all, of the time since that date."

Here was a clear admission by appellee that restoration of his commission rate was to begin only when and if the Paperboard Division became profitable. Appellant does not point to the absence of a profit by the board division either as consideration for O'Reilly's reduction or as an excuse for nonper-

formance of the agency agreement. It is relevant because by his own testimony it was a condition precedent to a restoration of his commission to 3%.

With respect to appellant's accounting procedures by which pulp was billed to the Paperboard Division at market price, the purpose was to determine whether appellant was making a profit through its paperboard operation (Tr. 262). This method of charging raw material was expressly provided and agreed upon between appellant and appellee in paragraph 9 of the original agreement (Ex. 1, Tr. 13).

With respect to the burden of proof on the issue of whether the Paperboard Division ever became profitable, that burden was clearly on appellee. The agreement for reduction was admitted and proven by appellant's testimony. Appellee clearly had the burden of proof to establish the condition which was to be precedent to a restoration of his commission rate. The issue is no different than it would have been if O'Reilly had pleaded the modified agreement, *i. e.*, had alleged, as he now claims, that his compensation from January, 1949, forward was to be at the rate of $1\frac{1}{2}\%$ "until the operation became profitable," whereupon it would be raised retroactively to 3%. He is now attempting to recover without establishing the condition precedent to a restoration of his commission.

Not only did appellee make no effort to establish the happening of this condition precedent, but there is a clear inference from his own testimony that the

operation did not ever become profitable during O'Reilly's employment. O'Reilly himself knew that the operation was unprofitable in January, 1949 (Tr. 97). Throughout the remainder of his employment, O'Reilly, as manager of the Paperboard Division, was clearly in a position to know the financial aspects of its operations. He received monthly statements showing net sales (Ex. 11, Tr. 93-94). His first claim to commissions at the rate of 3% in lieu of $11\frac{1}{2}\%$ from January, 1949 forward was made some two years after termination of his employment had been agreed upon (Ex. A-6). Even then, it was coupled with language showing his claim for additional compensation was contingent on a determination that the operation had become profitable, and was limited to periods in which it had been profitable.

The trial court's error and the fallacy of appellee's reasoning becomes more apparent when it is considered that O'Reilly himself testified that he was agreeable to receiving a $11\frac{1}{2}\%$ commission for the month of January, 1949 (Tr. 109), a month for which the trial court awarded him an additional $11\frac{1}{2}\%$.

REPLY ARGUMENT ON SPECIFICATION OF ERROR NO. 2

Appellee's brief attempts to distinguish the nine cases cited by appellant in its original brief as es-

tablishing that no consideration is required for the modification of an existing executory contract. Appellee claims that these cases fall into two categories, holding as follows:

1. A contract can be modified without fresh consideration where there has been no substantial performance on either side; or

2. A contract can be modified where there has been partial performance and the parties agree to terminate or modify future performance on both sides.

Examination of the cases cited will not support appellee's attempted distinction.

Appellee suggests no reason in logic why a wholly executory contract can be modified without consideration but a partially executory contract cannot be. The cases make no such distinction. In fact in the first case claimed by appellee to come within the first category above, *Hunter's Cattle Co. v. Carstens' Packing Co.*, 129 Wash. 377, 225 Pac. 68 (1924), it is clear that performance had already begun at the time the parties modified their original agreement, by relieving one of the parties from compliance with one of its terms. As cited in appellant's original brief, the court said: (p. 379)

"* * * while a contract remains executory in a substantial measure on both sides, an agreement to annul or modify on one side is a consideration for an agreement to annul or modify on the other side."

The cases of *Meyer v. Strom*, 37 Wn. (2d) 818, 226 P. (2d) 218 (1951), and *Neilson v. Northern Equity*

Corp., 147 Wash. Dec. 155, 286 P. (2d) 1034 (1955), expressly cite the *Hunter's* case. None of the cases relied on by appellant makes the distinction that a wholly executory contract, as distinguished from a partly executory one, can be modified without fresh consideration. The test set forth in the cases is whether the contract "remains executory in a substantial measure." At the time of the modification in this case clearly the contract remained "executory in a substantial measure."

With respect to cases cited by appellant and claimed by appellee (Br. 8) to stand for the proposition "that the release of the unperformed duties of the one party will support the release of the unperformed duties of the other," no reading of the leading Washington case of *LaPlante v. Hubbard*, 125 Wash. 621, 217 Pac. 20 (1923), will support appellee's analysis, and reference is made to the portions of that opinion set forth in the original brief at pages 20-21. Nor do the federal cases cited support appellee's position. In *Mid-State Products Co. v. Commodity Credit Corp.*, 196 F. (2d) 416 (7th Cir. 1952), plaintiff and defendant were parties to a fixed price contract for the sale of powdered eggs. The contracts were amended to provide for payment on a cost-plus basis, which materially reduced the seller's profit, while the seller remained obligated to deliver the contracted quantity, and did so. After the contract was fully performed, the seller

brought an action to recover on the original contract. Clearly, there had been no release of any unperformed duty on the part of seller. The court cited the Supreme Court decisions relied upon by appellant and its statement of the applicable law appears in appellant's original brief at page 25.

Appellee's brief (Br. 10-12) cites six Washington cases which are apparently claimed to hold that the binding modification of an executory agreement requires new consideration. At least, if the cases do not stand for that proposition, they are irrelevant and of no assistance to appellee.

While it might be sufficient to point out that all of appellee's cases precede the *Meyer* and *Neilson* decisions, *supra*, p. 7-8, it is submitted that they are in fact distinguishable.

Two of appellee's cases, *Allen v. Farmers & Merchants Bank*, 76 Wash. 351, 135 Pac. 621 (1913), and *Keane v. Fidelity Savings & Loan Association*, 173 Wash. 199, 22 P.(2d) 59 (1933) do not involve modification of a contract. The former concerns a parole agreement alleged to have been made *contemporaneously* with a written agreement. The latter involved a guaranty of payment by the promissor to induce the performance of the promisee's contract with a third party.

Mosher v. Mosher, 25 Wn. (2d) 778, 172 P. (2d) 259 (1946), does not involve an attempted modification of a contract, but a claim of an oral agreement

for the reduction of support payments provided by an Oregon divorce decree. The court stated that the obligation to pay a sum certain could not be discharged by payment of a lesser sum, but rested its decision on the finding that no such contract had been made, and that, in any event, the mother could not surrender rights conferred on the children by a court decree.

In the remaining cases, the party relying upon the original agreement had no further duties to perform before being entitled to performance from the party claiming a modification. In *Harris v. Morgensen*, 31 Wn. (2d) 228, 196 P. (2d) 317 (1948), plaintiff was in default under a lease and a contract of conditional sale, which entitled the defendants to retake the property and retain all prior payments. The plaintiff claimed the original contract had been modified, after default, by an agreement that the defendants would cancel plaintiff's indebtedness and refund the sum of \$500.00 theretofore paid, and that plaintiff would surrender the property. Plaintiff claimed the surrender of the property constituted consideration for the agreement to refund \$500.00. The court held the claimed modification void for want of consideration, because defendants were entitled to immediate possession, without further performance on their part.

So, in *Queen City Construction Co. v. Seattle*, 3 Wn. (2d) 6, 99 P. (2d) 407 (1940), and *Westland*

Construction Co. v. Chris Berg, Inc., 35 Wn. (2d) 824, 215 P. (2d) 683 (1950), the original agreement required the contractor to perform certain work, for a stated price. It was claimed that the original agreement was modified to provide extra compensation for work included in the original contract. The contractor was obligated to perform the work before being entitled to payment under the contract. It may also be noted that the latter case involved a wholly executory agreement, which, under appellee's view of the law (Br. 7-8), may be modified without fresh consideration.

Appellee's cases therefore establish no more than that, where one party to a contract is in default, or the time fixed by the contract for his performance has arrived, and the other party has fully performed, or is not obligated to perform until a later time, agreement by the latter to pay a larger sum for the contracted performance is void for want of consideration.

Other distinguishing factors were present. With the exception of the *Queen City* case, *supra*, testimony as to a modification was in dispute. In that case, the contractor received the additional compensation provided by the modification for all work performed from the time of the modification until it was notified by the City that the work was covered by the original contract and extra payment

would no longer be made. There was no claim by the City to recover payments made under the modification agreement, and the Court carefully pointed out that such a claim "would present an entirely different question." (3 Wn. (2d) at page 20)

The question not decided was one governed by prior and subsequent decisions of the Washington Supreme Court cited in appellant's original brief, pp. 34-37, which hold that where a modified agreement has been executed, it cannot be disturbed for want of consideration.

In contrast to appellee's cases, the instant case is one in which appellant was not in default under the original agreement at the time of the modification, and appellee and appellant had continuing mutual obligations. There was no modification as to past due commissions. The factual situation in the instant case is closely analogous to an illustration contained in the *Restatement of Contracts*, an authority frequently relied upon by the Washington Court. Section 416 states as follows:

"Sec. 416. DISCHARGE OF DUTY TO RENDER RETURN PERFORMANCE BY MANIFESTATION OF ASSENT AT TIME OF PERFORMANCE.

Where one party to a bilateral contract at the time when he renders performance manifests to the other party assent to forego all or part of the performance promised as an agreed exchange by the other party, the latter's duty is to that extent discharged."

Comment (c) thereunder is as follows:

"c. The act manifesting assent to discharge may be done at any time before performance, provided the effect of the act as a manifestation is continuing at the time of performance. Assent to discharge manifested after that time is not within the rule stated in the Section, and is generally inoperative unless supported by sufficient consideration (see Sec. 406). A party to a contract cannot increase his duty thereunder without fulfilling the requirements for the formation of contracts; but *either party can diminish the duty of the other party by manifesting an intent to do so on rendering his own performance*. Either party, moreover, can increase his own performance as much as he chooses, though he cannot enlarge his duty to render the increased performance. (Emphasis supplied)

Illustration 2 is squarely in point:

"2. A contracts to build a fence for B, who contracts to pay \$500 therefor. A begins to build the fence and as he starts says to B, "That price we agreed on is too high, you need pay only \$400 for the fence." A then completes the fence. B's duty is limited to the payment of \$400."

Bellingham Securities Syndicate, Inc. v. Bellingham Coal Mines, Inc., 13 Wn. (2d) 370, 125 P. (2d) 668 (1942), and *Seattle Investors Syndicate v. West Dependable Stores*, 177 Wash. 125, 30 P. (2d) 956 (1934), cited by appellee, do not involve a question of modification.

REPLY ARGUMENT ON SPECIFICATION OF ERROR NO. 3

Under this heading, appellant argued that the agreement of July, 1951, constituted an accord and

satisfaction of all matters arising out of appellee's employment, and that he is now estopped from asserting the claim in suit.

Appellee's answering argument avoids the questions raised under this heading by convenient distortion and assumptions with regard to appellant's position. It will therefore be restated:

1. Appellant was entitled to terminate appellee's services in July, 1951; in fact, at any time subsequent to May, 1949.

2. The parties reached an agreement under which appellee received compensation for a period of six months beyond that proposed by appellant.

3. Appellee manifested apparent assent to the agreement as a complete settlement of all matters arising out of his employment. He affirmatively relied upon his reduction in commissions in urging that he receive compensation beyond September, 1951.

4. Appellant fully performed the July, 1951 agreement and the evidence is clear that appellee then believed and led appellant to believe that its performance was a complete satisfaction of any and all his claims, and appellee must have known that appellant so understood.

There is no room for dispute that appellee could have been discharged immediately in July, 1951. It is immaterial for these purposes whether this is because his services were unsatisfactory, or because he had breached his contract, or because the contract was terminable at will, or because it was void under the Statute of Frauds.

That being the case, appellant's payment of com-

pensation to appellee for the period through February 29, 1952, constituted abundant consideration for an accord and satisfaction. Appellant concedes that consideration is necessary for a binding accord and satisfaction, and has no argument with the numerous authorities to that effect cited by appellee.

It therefore becomes material to determine whether the agreement of July, 1951, under which appellee continued to receive compensation through February, 1952, was intended to be in final settlement of all the mutual obligations of the parties arising out of appellee's employment.

In July, 1951, appellant desired to terminate appellee's employment effective September 1, 1951, because of his interest in California Paperboard Company. In that state of affairs, appellee wrote appellant's president under date of July 12, 1951 (Ex. A-2). He reviewed his activity on behalf of appellant and proposed December 31, 1952, as the date for termination of his employment. In urging his continued employment until that date, he wrote as follows:

"As you know I voluntarily reduced my sales commission from 3% to 1½" *in January of 1950*. This 'till now covers an eighteen month period and the next eighteen months on the same basis brings up the proposed termination date." (The italics phrase should read "1½% in January of 1949" (Tr. 123-24).

“This proposal of mine is what I would consider to be the bare minimum in a separation arrangement with this company . . .”

Appellant does not contend that when appellee's separation, and compensation through February 29, 1952, was agreed upon in July, 1951, appellee expressly renounced any claim to recover additional commissions at the rate of $1\frac{1}{2}\%$ from January 1, 1949. Appellant did not know he had any such claim. Appellee had advanced his earlier voluntary reduction as a contention in favor of his retention beyond the date contemplated by appellant.

Appellee now contends that he did not intend to relinquish his right to $1\frac{1}{2}\%$ additional commission from January, 1949. Appellee's position therefore must be that where two parties fully compromise and settle their mutual obligations, one of them remains free at a future time to recover on a claim which existed at the time of the settlement, merely because it was not disclosed to the other party. Appellant's case of *Austin v. Union Lumber Company*, 95 Wash. 608, 164 Pac. 245 (1917), original brief, pp. 32-33, is a complete answer to appellee's contentions.

Appellee seeks to avoid the only reasonable construction of the words and conduct of the parties in July, 1951, by asserting that he did not intend to relinquish his claim for additional compensation, and that “there can be no accord and satisfaction

without a meeting of the minds and a specific mutual intention to settle a disputed claim." (Brief, 23)

The difficulty is that appellee's intention as to the meaning and effect of the July, 1951, agreement is determined by his "outward expressions and acts" rather than his secret mental reservations. 12 Am. Jur. "Contracts," Sec. 19, p. 516.

In 3 *Williston on Contracts* (Rev. Ed.), Sec. 681, p. 1967, it is said, on the question of intent of the parties, where there is a claim of waiver based on an accord and satisfaction:

"There must be a manifestation of mutual assent, but the actual mental intent is immaterial. When a case of surrendering a right by a new contract is presented where the apparent intent differs from the actual intent, the apparent intent controls."

The Washington Supreme Court has characterized conduct by an employee substantially similar to appellee's conduct here as a "furtive attempt" to fasten liability on the employer which it would not countenance. *Herman v. Golden Arrow Dairy, Inc.*, 191 Wash. 582, 586, 71 P. (2d) 581 (1937). There, Herman was employed by the dairy at the union wage scale, which provided additional pay for overtime work. After the termination of his employment, he sued to recover sums claimed due him, including overtime payments. He had accepted his monthly wages during his employment without disclosing any claim to overtime, until suit was filed.

The Court assumed that he was entitled to overtime payments under the terms of his contract, but held his conduct estopped him from claiming compensation for it.

See also *Yanoscheck v. Montgomery Ward & Co.*, 176 Wash. 137, 28 P. (2d) 270 (1934).

It would be strange if the law permitted a party to negotiate for and receive additional compensation, partly on the basis of a prior reduction in that compensation, and after receiving and accepting the benefits of his bargain, go back and recover on a claim such as this, because he had his fingers crossed at the time of the agreement. It is submitted that appellee's position is wholly without support.

Appellee's conduct subsequent to the July, 1951, agreement is equally inconsistent with any right now to recover additional compensation from January, 1949. See original brief, pp. 9-10.

Appellee's reliance on *Bellingham Securities Syndicate v. Bellingham Coal Mines*, 13 Wn. (2d) 370, 125 P. (2d) 668 (1942), and other cases cited on pages 20 and 21 of his brief, is misplaced. In that case there was no dispute and no attempted settlement. The debtor merely paid what it admitted it owed, and the creditor accepted it.

Unlike *Ingram v. Sauset*, 121 Wash. 444, 209 Pac. 699 (1922), here the evidence makes clear that appellant's agreement to pay and payment of compensation through February, 1952, was intended to be

in full satisfaction of any claim arising out of appellee's employment, that appellee knew appellant's intention and understanding, and requested and received the payments, including the "final check" with that understanding.

Appellee's claim that appellant did not incur the detriment prerequisite to an estoppel ignores the fact that appellee could have been discharged in July and appellant was under no obligation to pay appellee for any period after September, 1951. In effect, appellant granted appellee six months' severance pay in excess of \$11,500.00 (Ex. C to Conclusions of Law, Tr. 43) as an arrangement for his separation.

REPLY ARGUMENT ON SPECIFICATION OF ERROR NO. 4

Appellant's statement in its original brief, page 2, that it pleaded the Statute of Frauds as an affirmative defense was in error as correctly pointed out by appellee. Paragraph II of appellant's answer, however, denied "that the said contract was in writing." (Tr. 19) Appellee concedes that a general denial raises the issue of the Statute of Frauds, but argues that a special denial that the contract was in writing fails to do so. No authority is cited.

Moreover, if the Statute of Frauds was not sufficiently raised by this specific denial, the answer was nevertheless treated as amended to plead it as an affirmative defense by the trial court, which

referred to it as an affirmative defense in its Finding of Fact XIV (Tr. 41).

CONCLUSION

Appellant submits that reversal of this judgment is required by the evidence and the law.

In barest outline, appellee's employment agreement was modified, as to future commissions, by a voluntary reduction until the operation became profitable. There was no testimony from which it could be inferred that collection of the balance was to be postponed, and no effort to show that the operation did become profitable.

The trial court's finding that collection of the balance was "in effect" postponed can only have been a legal conclusion based on an erroneous view of Washington law, which holds that no fresh consideration is necessary for the binding modification of a contract which remains executory in a substantial measure.

Finally, appellee's secret or as yet unformed intention in July, 1951, to claim additional compensation from January, 1949, forward, cannot be given legal effect to the exclusion of his outward expressions and conduct at that time and subsequent thereto, so as to prevent the apparent agreement from constituting an accord and satisfaction, and his acceptance of appellant's performance estops him from asserting the claim in suit.

BRIEF ON CROSS-APPEAL

ARGUMENT

Appellee presented Conclusions of Law and a judgment providing for the payment of interest on each unpaid monthly amount allegedly due appellee as it accrued (Tr. 42-43, 46). In other words, appellee claimed interest on the 1½% claimed to have been unpaid for the month of January, 1949, from that month.

Accepting for the purpose of this question all Findings and Conclusions of the trial court, clearly no interest was payable. Appellee's testimony was:

"* * * as a temporary measure I would reduce the commission to one and one-half percent until the operation became profitable."
(Tr. 97)

* * *

"Q. (By Mr. Evans): On January 1, 1949, you were agreeable to receiving one and one-half percent commission — at least for that month—rather than three percent? A. Yes."
(Tr. 109)

* * *

"Q. Now, you made no demand on anybody for this additional one and one-half percent—at least up until the time you terminated your employment—did you? A. Not a demand, no." (Tr. 110)

The trial court found that appellee advised appellant "... that he would temporarily reduce his commission to 1½% . . . and would in effect, postpone collection of the remainder thereof." (Finding of

Fact No. X, Tr. 38) Appellee presented this Finding and took no exception thereto.

Appellee having voluntarily "postponed" collection of a part of his compensation, and having been willing to accept $1\frac{1}{2}\%$ for the month of January, 1949, it is clear that the claimed balance of his compensation was *not* due in that month, and no interest became payable.

No case cited by appellee holds that interest is payable on an amount before it becomes due, in the absence of an agreement to pay interest.

"In the absence of any contract to the contrary, interest on money becomes due and payable only when the money becomes due and payable." *Herzog v. Herzog*, 23 Wn. (2d) 382, 387, 161 P. (2d) 142 (1945).

In *Washington Fish & Oyster Co., Inc. v. G. P. Halferty & Co., Inc.*, 44 Wn. (2d) 646, 269 P. (2d) 806 (1954), the plaintiff recovered the balance of the purchase price due on a sale of canned salmon. Under the sale contract, payment was due when the various shipments of salmon arrived at destination. The plaintiff failed to show these dates, and the Washington Supreme Court reversed the judgment of the trial court which had awarded interest from the date of the last shipment. It held there was a failure of proof as to the time the principal became due, and, under the law of Washington, interest could not be allowed.

The situation in this case is identical. Here the

trial court found the plaintiff entitled to recover, but since he failed to prove when the principal became due, he is not entitled to interest.

It must also be remembered that the agreement of January, 1949, by which appellee "postponed" collection of a part of his commission, was made at a time when no commissions were due and payable by appellant to appellee.

Here there is no contention that the parties contracted for the payment of interest on the "postponed" portion of appellee's compensation or that appellant breached its agreement by not continuing to pay appellee at the rate of 3% each month despite his "voluntary reduction," and consequently no basis upon which an obligation to pay such interest can be imposed.

Respectfully submitted,

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No. 14,906

IN THE
UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUGET SOUND PULP AND TIMBER CO.,
a corporation,

Appellant,

vs.

JOE A. O'REILLY,

Appellee.

JOE A. O'REILLY,

Cross-Appellant,

vs.

PUGET SOUND PULP AND TIMBER CO.,
a corporation,

Cross-Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S PETITION FOR REHEARING

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INDEX

Page

| | |
|------------------------------------|---|
| Certificate | 1 |
| Reason Assigned for Rehearing..... | 2 |
| Argument | 3 |

TABLE OF CASES

| | |
|--|---|
| <i>Brown v. Cowden Livestock Co.,</i> 187 F. (2d) 1015 (9 Cir. 1951)..... | 2 |
| <i>Stevenot v. Norberg,</i> 210 F. (2d) 615 (9 Cir. 1954)..... | 3 |

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CERTIFICATE

STATE OF WASHINGTON }
COUNTY OF KING } ss.

MARTIN P. DETELS, JR., being first duly sworn upon oath, deposes and says that he is one of the attorneys for the appellant; that the within petition for rehearing is, in his judgment, well founded and is not interposed for delay.

Martin P. Detels Jr.

SUBSCRIBED AND SWORN to before me this 25
day of January, 1957.

G. L. Flynn

NOTARY PUBLIC in and for the State
of Washington, residing at Seattle.

REASON ASSIGNED FOR REHEARING

This petition for rehearing is limited to that portion of this Court's opinion and decision which sustained the trial court's holding that the original agency agreement was not modified by an agreement for the reduction of O'Reilly's commission from 3% to 1½%, effective January 1, 1949.

The Court's opinion makes it clear (pp. 4-5) that it regarded the trial court's holding on this phase of the case as a determination of *fact*, and reviewed it as such.

This Court obviously felt its powers of review to be limited, indicating that it might reach a different conclusion if the question were one of law.

Appellant's position was and is that there was no dispute in the evidence on this point, and that the trial court's holding was one of law.

Where the evidence is not in dispute the legal consequences which flow from such evidence present a question of law and not of fact, and this Court has frequently ruled that it is free to draw its own conclusions in such a case.

In *Brown v. Cowden Livestock Co.*, 187 F (2d) 1015 (9th Cir., 1951) this Court was called upon to review a trial court judgment based upon conclusions as to the legal consequences of transactions on July 16, 1947, which conclusions were set forth in the trial court's Findings of Fact. This Court said:

"The findings of the District Judge in this regard are in effect findings as to the effect of these transactions rather than findings which resolve disputed facts. Hence we do not find ourselves obstructed by the traditional rule not to disturb findings of fact of the trial court. We are therefore free to make our own determination as to the legal conclusion to be drawn." (187 F. (2d) 1015, 1018)

Again, in *Stevenot v. Norberg*, 210 F. (2d) 615 (9th Cir., 1954) this Court said:

"When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions." (210 F. (2d) 615, 619)

ARGUMENT

There Are No Disputed Facts.

There was no conflict in the evidence relating to the reduction of O'Reilly's commission.

Two persons were present and participated in the critical conversation, the appellee, O'Reilly, and Roberg, appellant's vice-president.

It will be helpful here to review the testimony of each as to the substance of the conversation, together with the other evidence in the record bearing on that point.

O'Reilly testified on direct examination as follows:

"Q. Can you state now the substance of what you said to Mr. Roberg?

A. Well, I said to Mr. Roberg that the profits of the board division weren't very substantial and I said that as a temporary measure I would reduce the commission to one and one-half percent until the operations became profitable.

Q. Did Mr. Roberg say anything in response to that?

A. As I recall, Mr. Roberg said: 'That is a nice gesture.'

Q. By whom was the subject first raised?

A. It was raised by me." (Tr. 97)

On cross-examination, at Tr. 109, O'Reilly testified: "I voluntarily suggested a temporary reduction at that time, yes." At Tr. 144 he further testified on cross-examination:

"A. Well, I made the suggestion of taking a lesser amount for a period.

Q. A period that you did not stipulate?

A. That is right."

The only other evidence in the record bearing on O'Reilly's version of the conversation is contained in Exhibit A-1 and A-6. In A-1, O'Reilly's letter of July 12, 1951, he reiterates that at the time of the conversation he voluntarily reduced his commission from 3% to 1½%. (See Tr. 123-124). In A-6, written by O'Reilly on June 5, 1953, he stated as follows:

"You may recall that I voluntarily suggested that I take 1½% or half of the agreed amount starting January 1, 1949 *'until the operation became profitable.'*

"It is my considered opinion that your records, and/or an independent audit, will dis-

close the fact that the boardmill operation was profitable for the major portion, if not all, of the time since that date."

Roberg testified as follows:

"Mr. O'Reilly said he was going to voluntarily reduce his sales commission from three percent to one and one-half percent, and I asked him what prompted it, and he said he thought the business wasn't doing too well. I said: 'That is self evident.' " (Tr. 213)

There was also placed in evidence the substance of a memorandum from Mr. Roberg to Mr. Clayton Rogers, then Chief Accountant for appellant, advising Mr. Rogers that Mr. O'Reilly's commissions were to be reduced, effective January 1, 1949, to 1½%, (Exhibit A-10, Tr. 278), which information was confirmed verbally to Rogers by O'Reilly (Tr. 277). Mr. Roberg further testified that there was no mention in the conversation of a period of time for which the reduction was to be effective. (Tr. 217).

All testimony and evidence in the record relating to the conversation is without dispute on the following points:

1. Reference was made to the unsatisfactory state of the appellant's board division;
2. O'Reilly said he would voluntarily reduce his commission from 3% to 1½%; and
3. On behalf of appellant, Roberg agreed to such reduction.

Thus, it will be seen that the only evidence in the

record establishes without dispute what took place between the parties.

The only dispute which might be said to have existed with reference to the conversation referred to the period during which the reduction was to be effective. O'Reilly claimed that the reduction was to be "until the operations became more profitable" (Tr. 97). Roberg denied that there had been any mention "as to whether the reduction was to be for any period of time." (Tr. 217). This dispute, if it was one, would, however, go only to the question of the period to be covered by the modification, and has no bearing on the question of whether or not there was a modification.

The evidence is undisputed and without conflict on this phase of the case. In that state of the evidence there was no issue of fact and no determination of fact, or room for such determination, by the trial court.

The Issue Was One of Law and Not of Fact.

The trial court held there was no modification or no valid agreement which modified the original agreement. (Findings of Fact Nos. XIII, XIV; Conclusions of Law Nos. II, IV, Tr. 41-42).

The true nature of the holding is not controlled by whether it be labelled a "Finding of Fact" or a "Conclusion of Law". That the trial court embodied its holding on the question of modification in its

Findings, as well as its Conclusions, does not, of course, determine the scope and function of the Court's review. In both of the cases cited, the Court reversed the judgment below, where it reached a different conclusion, although the trial court's conclusion was embodied in its findings, without regard to the "clearly erroneous" rule.

Essentially, the question before the trial court was whether there had been an *effective* modification. This could be either a question of law or of fact, dependent upon the issues presented. The evidence being undisputed, the only issue was the legal effect of the transactions between the parties. This would necessarily be a legal conclusion, freely reviewable by the appellate court.

***The Trial Court Determined This Issue As
An Issue Of Law.***

The Findings of Fact and Conclusion of Law clearly show that the trial court's holding related to the *validity* of the modification.

The trial court touched on the issue of modification in three Findings of Fact, Nos. X, XIII and XIV, and in two Conclusions of Law, Nos. II and IV.

The sole evidentiary finding relating to modification is contained in Finding of Fact No. X (Tr. 38-39) which recites as follows:

"That in December, 1948 or January, 1949, plaintiff, without consideration or promise of consideration, advised defendant Puget Sound

Pulp & Timber Co. that he would temporarily reduce his commission to $1\frac{1}{2}\%$ of net sales of the Paperboard Division of defendant corporation [and would in effect, postpone collection of the remainder thereof.] * * * That said reduction in plaintiff's commission from 3% to $1\frac{1}{2}\%$ of the net sales of said Division was without consideration or promise of consideration."

(That the portion appearing in brackets was a legal conclusion without factual support in the record was recognized by this Court in its opinion in the paragraph beginning on page 4 and ending on page 5.)

Findings XIII and XIV are clearly non-evidentiary and conclusory in nature, and cannot be determinations of issues of fact, because the facts are undisputed.

The exact basis for the trial court's disposition of the issue of modification is clearly disclosed in its Conclusion of Law No. II (Tr. 42):

"That no *consideration* was promised or tendered by defendant, Puget Sound Pulp & Timber Co., nor received by plaintiff for the reduction of plaintiff's commission from 3% to $1\frac{1}{2}\%$ of net sales of the Paperboard Division of defendant corporation, nor were there any *valid* agreements of any kind or nature entered into between plaintiff and defendant, Puget Sound Pulp & Timber Co., a corporation, which in any way vitiated or modified, or in any way changed or altered the duties and obligations of said defendant, Puget Sound Pulp & Timber Co., to the plaintiff herein." (Emphasis supplied)

Consideration of the Findings and Conclusions relating to modification as a whole makes it clear that

the trial court was holding that there was no *valid* modification, because it regarded *consideration* as required for the valid and binding modification of an executory or partially executory agreement. That is why the trial court repeatedly emphasized lack of consideration, a matter that would be relevant only to a determination of the legal conclusion to be drawn from the transactions between the parties.

This is the precise question raised by appellant in its Specification of Error No. 2 (Appellant's Brief 12-13) and in argument thereon. Treating the trial court's determination that there was no *valid* modification as a determination of fact, this Court's opinion did not consider this question. Under the Court's holdings as to the scope of its review of trial court determinations based on undisputed evidence, in the *Brown* and *Stevenot* cases, it should have done so. Appellant therefore submits that this Court should determine for itself the issue of law arising from the undisputed facts, and that the case should be reheard on that question.

Respectfully submitted,

EVANS, McLAREN, LANE,
POWELL & BEEKS
VAUGHN E. EVANS
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*Attorneys for Appellant
and Cross-Appellee.*

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No. 14913

**United States
Court of Appeals**
for the Ninth Circuit

KEENAN PIPE & SUPPLY COMPANY, a Corporation,

Appellant,

vs.

B. E. SHIELDS, as Trustee in Bankruptcy of
James T. Inman,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Northern Division.**

FILED

FEB -8 1956

No. 14913

United States
Court of Appeals
for the Ninth Circuit

KEENAN PIPE & SUPPLY COMPANY, a Corporation,

Appellant,

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | PAGE |
|---|------|
| Answer | 5 |
| Attorneys, Names and Addresses of..... | 1 |
| Certificate of Clerk..... | 99 |
| Complaint | 3 |
| Exhibits, Plaintiff's: | |
| No. 1—Check No. 5314, Dated August 9, 1953 | 97 |
| 2—Check No. 5465, Dated September 4, 1953 | 98 |
| Findings of Fact and Conclusions of Law..... | 10 |
| Judgment | 12 |
| Notice of Appeal..... | 13 |
| Request for Clerk's Transcript..... | 14 |
| Statement of Points and Designation of Record | 101 |
| Transcript of Proceedings..... | 15 |
| Witnesses: | |
| Deeter, John H. | |
| —direct | 68 |
| —cross | 73 |
| —redirect | 86 |

Witnesses—(Continued) :

Inman, Mrs. Dolly

—direct 53

—cross 60

Inman, James Thomas

—direct 19

—cross 35

—redirect 45

—recross 49

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Bakersfield, Calif.

In the District Court of the United States, Southern
District of California, Northern Division

No. 1373—ND

B. E. SHIELDS, as Trustee in Bankruptcy of
James T. Inman,

Plaintiff,

vs.

KEENAN PIPE & SUPPLY COMPANY, a
California Corporation,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action
alleges:

I.

Plaintiff is Trustee in bankruptcy of James T. Inman, bankrupt, and brings this action under Section 60(b) of the Act of Congress relating to Bankruptcy.

II.

On June 10, 1953, August 7, 1953, and August 8, 1953, and within four months of the filing of the petition in bankruptcy herein, defendant, was paid by the bankrupt the sums of \$3,037.39, \$5,416.63 and \$769.01, respectively, on account of an antecedent debt.

III.

That said transfer was as follows: Defendant caused one John Deeter, a general contractor, to make checks in the above-designed amounts, being

moneys due to the bankrupt under a construction contract, payable jointly to defendant and the bankrupt; that the bankrupt endorsed said checks and delivered them to defendant.

IV.

The effect of said transfer was to enable the said defendant to obtain a greater percentage of his debt than some other creditor of the same class.

V.

At the time of said transfer the said James T. Inman was insolvent and the defendant or his agent acting with reference thereto then had reasonable cause to believe that the said James T. Inman was insolvent.

Wherefore, plaintiff demands

- (1) That the said transfer be set aside;
- (2) That plaintiff have judgment against defendant for the sum of \$9,223.03 with interest;
- (3) That plaintiff have judgment against defendant for costs.

V. P. DI GIORGIO,

/s/ V. P. DI GIORGIO,

Attorney for Plaintiff.

[Endorsed]: Filed July 8, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Keenan Pipe & Supply Company, a California Corporation, and in answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Answering the allegations contained in paragraph II, defendant admits that it received the respective sums therein alleged on or about the times therein alleged; denies generally and specifically each and every other allegation contained in said complaint.

II.

Answering the allegations contained in paragraph III, defendant admits that it received the sums set forth in paragraph II of said complaint at the times and in the amounts as set forth in said paragraph II and denies generally and specifically each and every other allegation contained in said paragraph III.

III.

Answering the allegations contained in paragraphs IV and V, defendant denies generally and specifically each and every allegation contained in said paragraphs.

For a Second, Separate and Further Defense, Defendant Keenan Pipe & Supply Company, a California Corporation, Alleges:

I.

That during the period of January, 1953, to and including the 17th day of October, 1953, the date of the filing of the petition in bankruptcy by said James T. Inman, herein, said James T. Inman was engaged as a subcontractor in the installation and construction of certain plumbing facilities for that job known as the "Staff Housing Utility, California Home for the Epileptic, Porterville, California," being then constructed for the State of California as the owner thereof by John W. Deeter, general contractor.

II.

That defendant during said period set forth in paragraph I of above sold and delivered to said James T. Inman, certain plumbing supplies, fixtures and equipment in the total sum of \$4,348.14 for his use, which materials were actually used in the installation and construction of said plumbing facilities as hereinabove alleged; that as of June 10, 1953, no part of said sum had been paid; and there was then due, owing and unpaid from said James T. Inman on account of said materials furnished and used in the construction of said Staff Housing Utility, California Home for the Epileptic, Porterville, California, said sum of \$4,348.14; that thereafter interest accrued on said sum during said period in accordance with the agreement in the fur-

ther sum of \$12.92, making a total of \$4,361.06 due, owing and unpaid.

III.

That at all times prior to the receipt of said payments said defendant was entitled to file a claim with the disbursing agent for the State of California for the plumbing supplies, fixtures and equipment furnished to and used by said James T. Inman on said Staff Housing Utility, California Home for the Epileptic, Porterville, California, job, in accordance with Section 1190.1 of California Code of Civil Procedure.

IV.

That said James T. Inman and the general contractor, John Deeter, proposed to defendant that if the latter would waive its rights to the security of said Section 1190.1 of the California Code of Civil Procedure, all payments to James T. Inman for work done under said subcontract would be issued by check naming James T. Inman and defendant as joint payees; that said defendant agreed to said proposal and waived all of his rights to file stop notices and the filing of its claim with said disbursing officer for the State of California in accordance with the provisions of said section, thereby substantially altering his position; and that said payments were made subsequent to said waiver agreement and were received in good faith as a consideration for said waiver; that the time for filing said notices and claims under said Section 1190.1 expired subsequent to the waiver agreement, the forbearance of defendant being a consideration for said payments.

For a Third, Separate and Further Defense, Defendant Keenan Pipe & Supply Company, a California Corporation, Alleges:

I.

That during the period of August 1, 1952, to and including the 17th day of October, 1953, the date of the filing of the petition in bankruptcy of said James T. Inman, herein, said James T. Inman was engaged as a plumbing contractor in the County of Kern, State of California; that during said period defendant sold and delivered to said James T. Inman plumbing supplies, fixtures and equipment in the total sum of \$21,624.96; that during said period and until August 7, 1953, said defendant had paid or received credit for a total of \$9,642.55; that there remained owing, due and unpaid as of August 7, 1953, the sum of \$11,982.41, to which thereafter interest accrued on said sum in the further sum of \$75.25, making a total of \$12,057.66 due, owing and unpaid.

II.

That prior to the receipt of said payments and as a part of said \$12,057.66 defendant was entitled to file materialman's lien under Section 1193.1 of the California Code of Civil Procedure to the extent of \$1,280.53 for materials sold to and used by said James T. Inman in the construction of plumbing facilities on residential jobs of said James T. Inman in the City of Bakersfield, County of Kern, State of California, described as follows: (1) 512 East 19th Street; (2) 121 El Tejon; and (3) 1821 Calvaliea,

being then constructed by said John Deeter as general contractor and said James T. Inman as a subcontractor.

III.

That said James T. Inman and the general contractor, John Deeter, proposed to defendant that if the latter would waive its rights to the security of said Section 1193.1 of the California Code of Civil Procedure, all payments to James T. Inman for work done on the jobs set forth above would be issued by check naming James T. Inman and defendant as joint payees; that said defendant agreed to said proposal and waived all of his rights to file claims of lien in accordance with the provisions of said section, thereby substantially altering his position; and that said payments were made subsequent to said waiver agreement and were received in good faith as a consideration for said waiver; that the time for filing said claims under Section 1193.1 expired subsequent to the waiver agreement, the forbearance of defendant being a consideration for said payments.

Wherefore, defendant prays:

1. That plaintiff take nothing by his complaint;
2. That defendant have judgment for his costs.

/s/ JOHN B. PETERMANN,
Attorney for Plaintiff.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 6, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause coming on for trial on the 16th day of May, 1955, and having been tried before the Court, a jury having been waived, John B. Petermann appearing as counsel for defendant, and Thomas R. Davis of the firm of V. P. Di Giorgio, appearing as counsel for plaintiff, and after hearing the allegations and proofs of the parties, the arguments of counsel, and being fully advised in the premises, the following Findings of Fact and Conclusions of Law constituting the decision of the Court in said action are hereby made:

Findings of Fact

1. That plaintiff, B. E. Shields, is trustee in the bankruptcy of James T. Inman, duly qualified and acting.

2. That within four months of the filing of the petition in bankruptcy of said James T. Inman, James T. Inman paid, or there was paid on his account from funds belonging to him, to defendant the sum of \$6,185.64 in two payments of \$5,416.63 and \$769.01.

3. That defendant was a creditor of the said James T. Inman.

4. That the payment of the aforesaid sums was on account of an antecedent debt owed by said James T. Inman to defendant.

5. That payment of said sum resulted in a depletion of the estate of said James T. Inman.

6. That at the time of the payment of each of the sums totaling \$6,185.64, the said James T. Inman was insolvent.

7. That at the time of said payments defendant had reasonable cause to believe that said James T. Inman was insolvent.

8. That as a result of the payments aforesaid, defendant was enabled to obtain a greater percentage of his debt than some other creditor of the same class.

From the foregoing facts, the Court concludes:

Conclusions of Law

1. The subject transfer of \$6,185.64 constitutes a voidable preference under Section 60 of the Act Relating to Bankruptcy.

2. The plaintiff should have judgment for \$6,-185.64 plus interest from the 12th day of April, 1954, being \$541.24, and costs of suit herein.

Let judgment be entered accordingly.

Dated this 11 day of July, 1955.

/s/ GILBERT H. JERTBERG,
Judge of the District Court.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 11, 1955.

In the District Court of the United States, Southern
District of California, Northern Division
No. 1373—ND

B. E. SHIELDS, as Trustee in Bankruptcy of
James T. Inman,
Plaintiff,

vs.

KEENAN PIPE & SUPPLY COMPANY, a
California Corporation,
Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 16th day of May, 1955, in the above-entitled Court, before the Honorable Gilbert H. Jertberg, judge presiding, sitting without a jury, a Jury having been expressly waived; Thomas R. Davis of V. P. Di Giorgio appearing as attorney for plaintiff, and John B. Petermann appearing as attorney for defendant, and evidence, both oral and documentary, having been introduced and the Court having heretofore made and caused to be filed its written findings of fact and conclusions of law;

It Is Ordered, Adjudged and Decreed that plaintiff have and recover from the defendant the sum of \$6,185.64 plus interest in the sum of \$541.24, and costs of suit herein, \$68.30.

Dated: July 11, 1955.

/s/ GILBERT H. JERTBERG,
Judge of the District Court.

[Endorsed]: Filed July 11, 1955.

Docketed and entered July 12, 1955.

In the District Court of the United States, Southern
District of California, Northern Division

No. 1373—ND

B. E. SHIELDS, as Trustee in Bankruptcy of
James T. Inman,

Plaintiff,

vs.

KEENAN PIPE AND SUPPLY COMPANY, a
California Corporation,

Defendant.

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF THE NINTH CIRCUIT

To the Clerk of the Above-Entitled Court:

Notice Is Hereby Given That Keenan Pipe and
Supply Company, a California corporation, above-
named defendant, hereby appeals to the Circuit
Court of Appeals for the Ninth Circuit from the
final judgment entered in this action on the 11th day
of July, 1955.

Dated this 2nd day of August, 1955.

/s/ JOHN B. PETERMANN,

Attorney for Appellant Keenan Pipe and Supply
Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 2, 1955.

[Title of District Court and Cause.]

REQUEST FOR CLERK'S TRANSCRIPT

To the Clerk of the Above-Entitled Court:

You Are Hereby Requested to Prepare the Clerk's Transcript in the above-entitled action and to include the following documents, to wit:

1. Complaint.
2. Answer to Complaint.
3. Findings of Fact and Conclusions of Law.
4. Judgment.
5. Notice of Appeal.
6. The exhibits offered by both parties and received into evidence.
7. The exhibits offered by defendant and not admitted into evidence.

You are further requested to obtain from the Court Reporter an estimate of his charges for preparing the Reporter's Transcript in this action.

Dated this 10th day of August, 1955.

/s/ JOHN B. PETERMANN,
Attorney for Defendant and Appellant Keenan Pipe
and Supply Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 10, 1955.

In the United States, District Court, Southern
District of California, Northern Division
No. 1373—ND

B. E. SHIELDS, as Trustee in Bankruptcy of
James T. Inman,

Plaintiff,

vs.

KEENAN PIPE AND SUPPLY COMPANY, a
California Corporation,

Defendant.

Honorable Gilbert H. Jertberg, Judge Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances of Counsel:

For the Plaintiff:

VINCENT P. DiGIORGIO, By
THOMAS R. DAVIS.

For the Defendant:

JOHN B. PETERMANN.

Monday, May 16, 1955, 10:00 A.M.

(Other court matters.)

The Clerk: That is the only matter except the
trial matters.

Mr. Davis: Your Honor, I wonder if it would be
appropriate at this time to inform the Court that
certain personal difficulties have arisen as to wit-
nesses in this Shields vs. Keenan Pipe matter, which

make it important, if possible, that we conclude that matter today. One of the witnesses is a general contractor who stands to lose a very large sum of money if he is forced to stay over.

The Court: Well, we have two trials set for today. Now in this Keenan case both counsel are from out of town, is that right?

Mr. Davis: Yes.

(Discussion re other case.)

The Clerk: Shields vs. Keenan Pipe and Supply Company.

The Court: All right, we are ready then in the case of Shields vs. Keenan Pipe and Supply Company.

Mr. Davis: Your Honor, I might make a brief opening statement.

The Court: You are Mr. Davis?

Mr. Davis: Yes, your Honor.

The Court: And Mr. Petermann?

Mr. Petermann: Yes. [3*]

The Court: Very well.

Mr. Davis: Your Honor, this is an action brought by a trustee in bankruptcy under section 60(b) of the Bankruptcy Act to void what the trustee alleges was an unlawful preference, or in this case a series of preferences.

Now, the complaint has alleged the payment of three sums of money in the four months' statutory period. I wish to inform the Court and stipulate at this time that the trustee has been persuaded that the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

first payment of \$3,037.39 was outside the four months' period. It is a very interesting point of law on which the trustee could not sustain his position. The check, for the Court's information, was certified without the four months' period but was deposited within it. There seems to be sufficient authority that the certification act is a sufficient assignment or perfection to put it without the purview of the Act.

The Court: Well, it seems to me when a bank certifies that it has X dollars which it will pay to somebody else that that is an obligation of the bank.

Mr. Petermann: Your Honor, in that connection I think it was actually delivered beyond the four months' period as well, so there could be no question.

Mr. Davis: That is correct, and the trustee is also so persuaded.

The Court: Yes. [4]

Mr. Davis: Now, as to the payment of \$5,416.63.

The Court: Five thousand four——

Mr. Davis: \$5,416.63, and \$769.01, the payment of these amounts is admitted in the answer, and it is admitted that, in paragraph III of the answer, these payments were made on or about the date specified.

Counsel has informed me also that he is willing to stipulate that the date of the filing of the petition in bankruptcy was October 17, 1953, so there then remains, your Honor, these issues on which the plaintiff will present evidence: Were the payments made at a time when the bankrupt was insolvent, and did the defendant have reasonable cause to believe that

the bankrupt was then insolvent? And in addition to that, certain special defenses which have been raised affirmatively in the answer.

With that, unless the Court has some other questions, I think we can proceed with the evidence.

The Court: Mr. Petermann, do you wish to supplement the statement?

Mr. Petermann: Just in one connection, with reference to the burden of proof of the trustee, I think there is one other issue, and that is this party received a disproportionate share than other members of the same kind, were received by this trustee.

Mr. Davis: He must have received a greater amount of [5] money than others in the same class. I didn't raise that issue because when you are dealing with general unsecured claims and there is less than one hundred per cent dividend to be paid it is automatic. I will sustain that burden of proof by testifying myself, if counsel wishes.

Mr. Petermann: I don't believe, counsel, that that alone is sufficient proof. At least the cases suggest the filing of a petition of bankruptcy and insolvency at the time of the filing is not proof that there was any insolvency in the prior four months' period. I think that is one of the issues.

Mr. Davis: Oh, yes, you are correct, counsel. He must have been insolvent at the time that the payments were made, but what I was saying was that the other element, the additional element which you correctly raised, that is that defendant must have received a greater amount of money than some other

creditor in his class is a burden which you correctly point out is also on me. I merely suggest to you that result is automatic wherever the claim is an unsecured and non-prior one and where there is less than one hundred per cent in dividends to be paid.

Mr. Petermann: Well, I think the burden of proof requires that if the man was insolvent at that particular time that it must further be shown that by that payment at that particular time this man received more than his proportionate share of his claim. [6]

Mr. Davis: I am afraid we will have to submit briefs on that, counsel.

The Court: All right, Mr. Davis, will you call your first witness?

Mr. Davis: Mr. Inman, please.

JAMES THOMAS INMAN

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: James Thomas Inman.

The Clerk: Have that seat there.

Direct Examination

By Mr. Davis:

Q. Will you state your full name, please?

A. James Thomas Inman.

Q. And did you file a petition in bankruptcy in this court? A. I did.

(Testimony of James Thomas Inman.)

Q. On or about October 17, 1953?

A. That is correct.

Q. Where do you live, Mr. Inman?

A. At the present time, 3131 South H Street, Bakersfield, California.

Q. And what is your occupation now?

A. Plumber. [7]

Q. What was your occupation in 1953?

A. Master plumber.

Q. Does that encompass subcontracting?

A. That is right.

Q. I see. Mr. Inman, inviting your attention to the general period of 1953, did you have occasion to have any business relations with the Keenan Pipe and Supply Company? A. Yes.

Q. Would you tell the Court what that business relation was?

A. Well, under the past circumstances of doing business with Keenan Pipe and Supply there was one period there that I was on a cash basis with them strictly.

Q. Well, Mr. Inman, you have jumped ahead of me a little. Would you tell the Court whether you had—what your general business relations were with Keenan Pipe and Supply?

The Court: You might start in with when the relationship first occurred.

Mr. Davis: I invited his attention to the general period of 1953.

Q. Did you make any contractual arrangements with Keenan Pipe and Supply in 1953?

(Testimony of James Thomas Inman.)

A. To supply the material on the particular job.

Q. When did you make that contract? [8]

A. In '53, I believe.

Q. Can you tell the Court more closely when it was than just 1953? What part of 1953?

A. It would be in the first part.

Q. Early in 1953. What was that contract?

A. They were to supply me material on subcontracting housing and commercial work.

Q. Was there a specific job involved?

A. Yes.

Q. What was that job?

A. Well, Porterville State Mental Institution, one portion of it, the housing.

Q. And what was your relationship to that job?

A. Subcontractor.

Q. Subcontracting what?

A. The plumbing.

Q. I see. In the course of the performance under that contract, Mr. Inman, did you incur an indebtedness to the Keenan Pipe and Supply Company?

A. Yes.

Q. And will you tell the Court the total amount of that indebtedness, if you know?

A. Well, between \$11,000 and \$12,000.

Q. That was on an open account?

A. That's right. [9]

Q. Now, Mr. Inman, did you make certain payments on that open account during 1953?

A. Yes.

(Testimony of James Thomas Inman.)

Q. And would you tell the Court, as best you remember, what those payments were and when you made them?

Mr. Petermann: I submit, counsel, if we have his books on that I think they would probably reflect those payments.

Mr. Davis: We don't have any business records which would reflect that. This is purely foundational since the making of the payments has been admitted in the answer.

The Court: I think that's true. If you have an objection I will overrule it, but I didn't quite understand it as an objection, it was a suggestion.

Mr. Petermann: It was a suggestion.

The Court: Very well, proceed.

The Witness: From the time we entered into the contract on that particular job at that time, or any job, I don't remember or recall all of the payments that were made to Keenan Pipe and Supply, other than the latter part of the year.

Q. (By Mr. Davis): Would you tell the Court the payments in the latter part of the year that you remember?

A. There was one payment of \$3,000; there was another payment of \$3,039 and some odd cents, and a payment of \$5,416, and a payment of \$793, I believe; I don't recall. [10]

Q. Could it have been \$769?

A. Yes. I beg your pardon.

Q. Do you recall in your own mind the approxi-

(Testimony of James Thomas Inman.)

mate times that the latter two payments were made, the \$5,416 and \$769?

A. The \$5,416 payment was issued by the general contractor on the job July 7th, and the check was post-dated to August 7th, and the \$763 check was issued about three weeks later.

The Court: That would be towards the end of July?

The Witness: Approximately the first of August.

The Court: Was that second check post-dated?

The Witness: No.

Q. (By Mr. Davis): Then inviting your attention to the time of the making of the payment of \$5,416.63, I ask you whether taking all of your assets at a fair market value they would at that time have exceeded the amount of your indebtedness to your creditors?

Mr. Petermann: To which I object, your Honor.

This is one of the issues which the Court must decide and therefore it is invading the province of the Court, and calls for a conclusion of this witness.

Mr. Davis: Your Honor, it is arithmetical; the witness might be incorrect but if he can make the two figures, as \$10,000 or \$5,000, it is a matter—— [11]

The Court: Well, I don't think your question asked him to make the two figures. I think the question was whether or not in his opinion he was practically insolvent at the time. I think that perhaps he should state his views as to the fair market value of

(Testimony of James Thomas Inman.)

his assets and state what his indebtedness was, rather than making a conclusion.

Mr. Davis: Very well, your Honor.

Q. Mr. Inman, inviting your attention again to the time when the payment of \$5,416 was made, do you remember at this time what your assets were at that time? A. Approximately \$15,000.

Q. And does that include a house?

A. No, that was the indebtedness that I owed——

Q. No.

A. ——material bills and personal bills.

Q. I see. I will get to that in a moment. My question, Mr. Inman, at this point is directed at your assets, that is, those things which you owned or had an interest in which were of value. Now, could you tell the Court, taking all of the things of value, either real or personal property, and giving them their fair market value, your estimation what they would total? A. Approximately \$30,000.

Q. \$30,000? And would you tell the Court what those assets consisted of? [12]

A. Approximately \$15,000 in material bills.

Q. Mr. Inman, I don't think you comprehended my question, unless those bills were owed to you. You owed the bills, didn't you? A. Yes.

Q. I see. I don't mean to interrupt my witness, but——

The Court: Oh, no, the witness misunderstood the question.

Q. (By Mr. Davis): Mr. Inman, my present question is directed at this: Do you remember all of

(Testimony of James Thomas Inman.)

the things of value, whether they are real or personal property, that you owned at the time of the making of this payment of \$5,416?

A. I think so.

Q. And generally what did they consist of?

A. They consisted of a home and three automobiles.

Q. Very well. Now, Mr. Inman, taking the home and automobiles——

The Court: Pardon me. I didn't know from the inflection of the witness whether he had completed the answer to the question or not.

Mr. Davis: Oh, I am sorry.

The Court: You stated you owned a home and three automobiles at the time of making this \$5,000 odd dollar payment. Now, is that all you owned, your home and three automobiles? [13]

The Witness: Yes, other than the material I had stocked and the store.

Q. (By Mr. Davis): What value would you give to that material, Mr. Inman?

A. At current—at the prices that it was worth then approximately \$3,000.

Q. I see. Well, then, taking in your estimation, giving a fair market value to the automobile, your interest in the automobiles and the home and the material, would you tell the Court what in your estimation was their total value? Just a moment. I will withdraw that question.

Mr. Inman, were there any encumbrances against your home?

A. Yes.

(Testimony of James Thomas Inman.)

Q. And what was the total encumbrance against your home? A. \$11,000.

Q. In your estimation what is the fair market value, or what was the fair market value of the home at the time of the \$5,000 payment?

A. \$15,000.

Q. I see. Were there any encumbrances against the motor vehicles? A. No.

Q. You owned them clear? A. Yes.

Q. Very well. Then, I ask you this, Mr. Inman, taking [14] your equity in your home, and the three motor vehicles, and the materials on hand, and any other real or personal property that you may have owned, can you tell the Court what your estimation is of its then fair market value?

A. I wouldn't have anything left.

Mr. Peterman: I am sorry, I didn't hear that.

The Court: He said he wouldn't have anything left. That answer of course, is not responsive.

Mr. Davis: It may be stricken, your Honor.

The Court: Yes.

Q. (By Mr. Davis): Mr. Inman, we will discuss the matter of your debts in just a moment. My questions now are directed at your assets, those things which were of possible value. Now, taking this equity in your home, and the three motor vehicles that you have told the Court you owned, and the stock on hand at your place of business, would you tell the Court what the total value of all that was, in your own estimation?

A. Approximately \$9,000.

Q. And at the same time, Mr. Inman, could you

(Testimony of James Thomas Inman.)

tell the Court what your total indebtedness to all your unsecured creditors was?

A. I don't offhand recall the total amount of the indebtedness.

Q. Can you give a reasonable approximation of that [15] figure?

Mr. Petermann: I am going to object again, your Honor. I believe the approximately and his best recollection are not the best evidence of what those were, and they are conclusions of the witness and are therefore objectionable, I think we should have a more accurate and definite statement of what those liabilities were.

Mr. Davis: Your Honor, I think the objection goes to the weight and not to the question itself. The business records of the bankrupt unfortunately are not in sufficiently good shape to present the evidence, and I think he can always testify to what his recollection was.

Mr. Petermann: I wish to make the further objection that this is not the best evidence of those liabilities.

The Court: Well, I think after a foundation is laid there are books and records, a summary might be given.

Mr. Davis: There are no books and records available, your Honor. I think I will be able to corroborate this by the testimony of the bankrupt's wife, but I thought it proper to ask him the preliminary question.

(Testimony of James Thomas Inman.)

The Court: Well, perhaps you better ask him as to the availability of the books and records.

Q. (By Mr. Davis): Mr. Inman, do you have available books and records which show the amount of your indebtedness at the time of the [16] making of this \$5,000 payment?

A. Not in my possession.

Q. Were there any such records kept?

A. Yes.

Q. And where are those records now?

A. In the hands of the trustee for this case.

Mr. Davis: Your Honor, I can only inform the Court that the trustee and I, and this is a representation to the Court, have looked through the records for a sufficiently clear picture that could be presented, and we were unable to find it. Now, I am not familiar with bookkeeping, but the trustee is fairly adept at it.

The Court: Will the trustee be here?

Mr. Davis: No, your Honor, I didn't bring him.

Mr. Peterman: I might state, your Honor, I attempted to look through them, too, and I could not ascertain anything, and for that reason I had hoped that maybe the accountant who was working on the books during the course of the business might have some records that would be available to Mr. Inman. Mr. Winters, who was listed as an accountant, and who prepared the schedules, is he available?

Mr. Davis: I made no attempt to locate him, frankly, counsel.

Your Honor, I again urge on behalf of the trustee

(Testimony of James Thomas Inman.)

that the best evidence rule has no application in our question [17] about the amount that was owed at a particular time. It may be better evidence in terms of credibility, but the best evidence rule, I think, is limited in its application as to what were the contents of some written document; if you write a letter, if the letter is available obviously it is the best evidence. But when you are asking a man about whether he owed people money the existence or non-existence of his books would only go to the credibility or weight of his testimony.

The Court: Well, it seems to me that you should develop from this witness a little more background as to his method of doing business, and what records, if any, he kept, and if he has any clear recollection as to his obligations owing at that time. I think there ought to be a little more foundation.

Mr. Davis: Very well. I see, your Honor.

Q. Mr. Inman, is your general recollection of the business transactions in the time of July and August of 1953 fairly clear today? A. Fairly clear.

Q. Do you remember the various jobs on which you were engaged? A. A few.

Q. And do you remember the materialmen and other business men to whom you owed money?

A. Yes. [18]

Q. Did you have any discussions with your wife which fixed that in your mind?

A. No, other than just I remember the material houses I owed money to, and who I owed money to.

Q. That is a fairly clear recollection?

(Testimony of James Thomas Inman.)

A. Yes.

Mr. Davis: Is that sufficient foundation?

The Court: I think so.

Q. (By Mr. Davis): Mr. Inman, would you then tell the Court, as of the time of the making of this \$5,400 payment, what the total amount of your liabilities was?

Mr. Petermann: Might I interrupt with the suggestion here, with reference to his recollection with reference to what he owed material houses, I think if we had an answer to his recollection as to them then we could proceed with what his other liabilities were. Your question assumes, or at least suggests there might have been others, and again we have no foundation as to anything other than material houses.

The Court: Well, it seems to me, Mr. Petermann, that you might develop those matters on cross-examination.

Mr. Petermann: Very well, your Honor.

Q. (By Mr. Davis): Is the question still clear in your mind, Mr. Inman, [19] or would you like to have it read back? A. About \$16,000.

Q. \$16,000?

The Court: That was owing to various material-men who supplied——

The Witness: Yes.

The Court: ——you with materials?

The Witness: Yes.

Q. (By Mr. Davis): Well, now, Mr. Inman, at

(Testimony of James Thomas Inman.)

any time prior to the making of this \$5,400 payment—excuse me. Withdraw that.

You also testified that you recollected that you made a \$769 payment to the Keenan Pipe Company?

A. Yes.

Q. Was there any substantial change in your financial condition between the making of the second payment and the first? Were your debts about the same?

A. Approximately the same.

Q. And were your assets about the same?

A. Yes. Just a short period of time elapsed between the two payments.

Q. Yes. Well, now, inviting your attention to the period of a month or two preceding the making of this \$5,400 payment, did you have any conversation with any member of the Keenan Pipe Company firm, or any agent of that company, [20] regarding your financial condition?

A. Yes.

Q. State where that conversation took place.

A. In my office.

Q. And who was present?

A. Mr. Keith, Mr. Tom Keith of Keenan Pipe and Supply, and my wife.

Q. And your wife, you say?

A. Yes.

Q. And can you tell us as closely as possible how long this conversation preceded the making of the \$5,400 check?

A. Within the same month.

Q. And would you tell me, or would you tell the Court what the substance of that conversation was? What did you say and what did he say?

A. Well, Mr. Keith was on a particular job in

(Testimony of James Thomas Inman.)

town threatening the owner with possible liens, and the owner called my office, and my wife in turn called me where I was working, and we met at the office, Mr. Keith and I, in my office and he told me then there was no other course for him to do but to hire an attorney and search out all of his jobs and file liens.

Q. What did you say?

A. And I told Mr. Keith if he did that it would finish me as a subcontractor in Bakersfield. [21]

Q. Was there anything further said in the course of this conversation by any of the three people present? A. Yes.

Q. Tell the Court in substance, as you remember, all of the things that were said at that conversation, and who said them.

A. Well, Mr. Keith said that he had to have money for the current bills that were due Keenan Pipe and Supply, and I told Mr. Keith that I did not have the money, and I was financially unable to get my hands on any money at that time to make the payments, and after a further conversation about the attorney and lien laws and various things, Mr. Keith left.

Q. I would rather you did not summarize any conversation. A. That is all I recall.

Q. Did you have any conversation, before that conversation or after that conversation, with any member of the Keenan Pipe Company?

A. Mr. Keith would come over to the office about once a week.

(Testimony of James Thomas Inman.)

Q. During what period?

A. That was before he was talking about the attorney.

Q. Do you remember any specific conversation from those you are now discussing?

A. Yes, he asked me—— [22]

Q. Just a moment. Where did this conversation take place? A. In my office.

Q. Who was present? A. My wife and I.

Q. Can you tell the Court, as best you remember, when that conversation took place?

A. Not a particular date. As I said, we——

Q. Can you tell the Court with reference to the making of the \$5,400 payment when it was had?

A. About three weeks before that payment was made Mr. Keith was in the office and asked me for an account on all of my jobs, in other words, how much money I had outstanding and how much it would take to finish the jobs, and I wrote down a few jobs of what I could recollect quickly, and showed it to him and showed the amount that was on it at the present time, which was approximately \$3,200, and Mr. Keith told me that that was not sufficient to pay what I owed Keenan Pipe and Supply at that time.

Mr. Davis: I see.

The Court: May I inquire, was this conversation last testified to subsequent to the other conversation you had with Mr. Keith?

The Witness: That was before.

The Court: I beg pardon?

The Witness: That was before. [23]

(Testimony of James Thomas Inman.)

The Court: The last conversation you testified to was before the first conversation with Mr. Keith that you testified to?

The Witness: Yes. We are going backwards in the calendar.

The Court: I see. Very well.

Q. (By Mr. Davis): Are there any other conversations with Mr. Keith or with any other member of the Keenan Pipe Company organization that you remember?

A. Approximately June, the month of June, in the early part of the month of June, Keenan Pipe and Supply called my office, the material house called my office.

Q. Do you know who was calling?

A. I believe it is the young fellow known as Junior. I never knew his name. He had quite a bit to do with the ordering and merchandising of——

Q. All right. A. ——material.

Q. Who talked to him on the phone?

A. My wife.

Q. Are there any other conversations that you recall that you had with any member of the Keenan Pipe organization?

A. I don't believe that I do.

Mr. Davis: I think that is all at this time. You may cross-examine. [24]

Mr. Petermann: May I stand?

The Court: If you prefer you can come to the lectern and that may facilitate things.

(Testimony of James Thomas Inman.)

Mr. Petermann: Thank you. I could hardly see the witness, your Honor.

The Court: Yes.

Cross-Examination

By Mr. Petermann:

Q. Mr. Inman, with reference to the properties which you had on hand in the latter part of June, and July of 1953, you have mentioned a home and three autos and material in stock, and I am not certain whether I heard you correctly, did you say something about a store?

A. A store I had rented.

Q. Did you own the store? A. No.

Q. You had it rented? A. Yes, sir.

Q. And you were receiving rental from it?

A. No, sir, I owed \$700 rent on the store.

Q. The store was not rented then at all?

A. I was the rentee.

Q. Well, then you had a liability arising out of having a store rented, is that correct? You owed money by virtue of having rented that store, is that correct? [25] A. Yes.

The Court: Did you have a lease on the store?

The Witness: No, sir. The store was owned by a man in Los Angeles, and I was paying \$100 a month.

The Court: Did you have a written lease?

The Witness: No, sir.

The Court: Month to month?

(Testimony of James Thomas Inman.)

The Witness: Month to month, verbal contract.

Q. (By Mr. Petermann): What was the \$100 a month to cover? A. The rent on the store.

Q. You had no purchase contract? A. No.

Q. Now, with reference to the three automobiles, what kind of automobiles were they?

A. '40 model International ton and a half truck, and '41—'47 Packard sedan, '49 model Ford pickup.

Q. Now, what was the value of those three cars together? A. Thousand dollars.

Q. Now, at this time you had a job going at Porterville, which you have testified to, did you not?

A. Yes.

The Court: Did you answer the question?

The Witness: Yes, sir, I did.

The Court: Would you speak audibly. It is important [26] for me and it is important for the reporter.

Q. (By Mr. Petermann): And you had a written contract on that Porterville job, did you not?

A. Yes.

Q. Now, were there certain other items in addition to those covered by that contract for which you had a claim, or had done work?

A. On that contract?

Q. Yes. A. No, just the one contract.

Q. Well, now, at the Porterville job were there not certain other items for time and labor which you had a claim on?

A. That would be a change order on the same contract.

(Testimony of James Thomas Inman.)

Q. I understand. Now, what was the total amount of your claim for that labor on the change orders on that contract?

Mr. Davis: Just a moment. Your Honor, I object to it on the ground that it doesn't indicate as of when the claim obtains, at the time the contract is fully executed, or what?

The Court: Well, I understood counsel was directing the question to June or July, along about the time the payments, the first payment was made, the payment of \$5,400. Is that correct?

Mr. Petermann: That is correct, and if I may be [27] specific I will say at or about the time of the \$5,400 payment.

A. The contract was entered into approximately a year before that.

Q. At the time of the \$5,400 payment, how much did you claim was due you on the change orders?

A. There was approximately \$9,000, I believe, on the change orders.

Q. Now, you filed a claim for that amount, did you not?

A. Yes.

Q. And you kept records to support that claim?

A. I filed that claim through the general contractor for approximately \$12,000, and the check that came back from the State of California to the contractor, my portion was only \$9,000 approximately, and the State objected to certain things that I had put on the material billing.

Q. Now, when you approximated the total of your assets as of the time of this first payment, I

(Testimony of James Thomas Inman.)

believe you estimated them at the time of the \$5,400 payment to be approximately \$9,000. That did not include your claim for these change orders, did it?

A. No.

Q. Those would be in addition to that amount, would they not? A. Yes. [28]

Q. Now, at the time of the first payment, do you recall how much you owed at that time to Keenan Pipe and Supply Company on account of materials and supplies purchased from them?

A. The best that I can recall would be \$11,000.

Q. Now, did you include the sum which you owed to the Keenan Pipe and Supply Company of \$11,000 in the total indebtedness which you approximated at \$16,000? A. No.

Q. You mean that was owed in addition to the \$16,000 which you estimated before, and additional sum of \$11,000 to Keenan Pipe and Supply Company? A. Yes.

Q. Now, to whom was that \$16,000 owed?

A. That I would have to check off on my records or books to get it down perfect.

Q. Well, now, was it owed to more than one person? A. Yes, several.

Q. How many would you say?

A. Oh, I would estimate 15.

Q. And who were the principal creditors?

A. The United States Government was one of them.

Q. And how much did you owe the United States Government? A. Approximately \$5,000.

(Testimony of James Thomas Inman.)

Q. Now, who were the other persons to whom you owed [29] money?

A. I owed the Bank of America and the Anglo Bank.

Q. How much did you owe them?

A. \$1,100.

Q. And what kind of an obligation was that?

Was that a note? A. Yes, personal note.

Q. Was that secured by any property?

A. One of them was secured, and one was unsecured.

Q. What was the security under that obligation?

A. Co-signer.

Q. No property? A. No.

The Court: Do I understand you owed \$1,100 to each bank?

The Witness: No. One \$600 and one \$500.

Q. (By Mr. Petermann): Now, besides the United States Government and the two banks, who did you owe money to?

A. Bernstein Pipe and Supply.

Q. And how much? A. \$2,650.

Q. And anyone else? A. Tay Holbrook.

Q. I beg your pardon?

A. Tay Holbrook, Incorporated. [30]

Q. And how much?

A. Approximately \$1,500.

Q. Any other parties?

A. Offhand I can't recall.

Q. Of that \$16,000, aside from that owed to the

(Testimony of James Thomas Inman.)

Keenan Pipe and Supply Company, approximately \$5,000 was owed to the United States Government?

A. It was.

Q. And was that owed on account of taxes?

A. Yes.

Q. Do you recall what taxes, what type of tax it covered?

A. Withholding.

Q. From your employees?

A. Yes.

Q. Now, with reference to these two payments, the one for \$5,400 and the other one for \$769 approximately, were each of those payments made by your checks?

A. Of the last two checks, \$5,400 and \$700?

Q. Yes.

A. No.

Q. Now, were either of them made by your checks?

A. No.

Q. Now, do you know whose check was used for the \$5,400 payment?

A. The general contractor's on the job. [31]

Q. And would that be Mr. John Deeter?

A. Yes.

Q. And do you recall whether or not that was payable to you alone? Was that check paid to you alone?

A. No.

Q. Did it have someone else as a payee?

A. Yes.

Q. Were you and this other party named as co-payees, as payees together?

A. Yes.

Q. And was that other payee the Keenan Pipe and Supply Company?

A. Yes.

Q. Now, is that true likewise of the \$700 check?

(Testimony of James Thomas Inman.)

A. No.

Q. Now, do you recall who was the payee on the \$700 check?

A. I believe it was Keenan Pipe and Supply alone.

The Court: In other words, there was no co-payee on the \$700 check, according to your recollection?

The Witness: No.

Q. (By Mr. Petermann): Now, of these materials which were owed to the Keenan Pipe and Supply Company, the bulk of those materials went into jobs you were then working on, did they, [32] not? A. Yes.

Q. In other words, they were not delivered to your store for sales over the counter?

A. Some of it was.

Q. Do you know how much of these materials actually went into jobs—may I withdraw that question?

At the time of this \$5,400 payment, can you tell us what proportion of the amount then owed to the Keenan Pipe and Supply Company had gone into jobs which you were then doing?

A. No, I could not.

Q. Would you say substantially all of it had?

A. The material that I bought from Keenan Pipe and Supply was mostly of a particular brand, and it was distributed to various jobs throughout the city and county of Bakersfield. As I had men employed I would never know where the material

(Testimony of James Thomas Inman.)

went to in one particular job as it would be picked up and put on the truck and maybe carried on the truck two or three days before it got around. There were numerous items of one kind would be distributed over various jobs.

Q. Well, can you tell me what proportion of these materials actually went into jobs?

A. All of it went into jobs with the exception of small amounts sold over the counter.

Q. Do you have any idea at this time, any recollection [33] of how much was sold over the counter?

Mr. Davis: Your Honor, the trustee is prepared to stipulate for the purposes of this lawsuit it may be assumed that all of the assets went into jobs of Mr. Inman.

Mr. Petermann: Very well, I accept the stipulation.

May I take one second, your Honor?

The Court: We might take a short recess at this time. We will recess for about ten minutes.

(A short recess was taken.)

Mr. Petermann: I have just about three questions, your Honor.

The Court: Yes. Go right ahead.

Q. (By Mr. Petermann): Mr. Inman, referring back again to the time of the payment of the \$5,400 to the Keenan Pipe and Supply Company, at that time did you have the machinery and equipment which you later listed in your schedules in bankruptcy?

A. Yes.

(Testimony of James Thomas Inman.)

Q. And according to my memoranda that was valued at \$1,500. Was that in addition to the automobiles, the home, and the stock in trade that you gave me a little earlier?

A. I don't recall the \$1,500 in machinery and equipment.

Q. I read from your schedules, B-J I believe, and made some notations, in which I have listed machinery at \$1,500. Is that correct? [34]

Mr. Davis: I am looking it up, counsel. It appears to be on the summary. Just a moment and I will find it.

The Court: My notes show that the witness testified that he had materials of approximate value of \$3,000.

Mr. Petermann: Yes.

Mr. Davis: I think that is correct.

Mr. Petermann: That would have been listed. I believe, your Honor, under schedule 2-C in his bankruptcy schedules, and I was inquiring with reference to that.

The Court: Oh, yes.

Mr. Davis: 2-C lists \$2,000, and 2-J approximately \$1,500 is the figure given.

The Court: Of machinery?

Mr. Davis: Yes, your Honor, machinery, fixtures, apparatus and tools used in business.

Mr. Petermann: Mr. Davis, maybe you can give me this information as well: Does the item shown under schedule B-2-d, household goods of \$1,000, is

(Testimony of James Thomas Inman.)

that likewise included in the exempt property under schedule B-5?

Mr. Davis: Yes, it is.

Mr. Petermann: In other words, the total of the household goods and exempt property is the sum of \$1,750?

Mr. Davis: I am afraid you lost me there.

Mr. Petermann: Well, I noted that the household goods schedule under 2-D were listed as \$1,000, and the exempt [35] property listed at \$1,750.

Mr. Davis: Property claimed to be exempt by state laws \$1,000 for household furnishings. I think your notes may be in error there. You list it twice in the schedules; you list it first as an asset and then as a claim of exemption, and the same furniture is listed in both places.

Mr. Petermann: I understand.

The Court: Well, in addition to the \$1,000 household exemption were there other items totaling \$1,750 that were listed as exempt?

Mr. Davis: Oh, yes, your Honor. The 1941 panel pickup was claimed exempt, the plumbing tools of \$500, and the homestead.

Mr. Petermann: I think that answers that question.

Q. Now, you had those items of property on hand, did you, at the time of the \$5,400 payment?

A. Yes.

Q. Did you have any other items which were disposed of by you between the time of the \$5,400 payment and October 17, 1953?

(Testimony of James Thomas Inman.)

A. I had some farming equipment that was repossessed.

Q. And what was the value of that farming equipment at the time of the \$5,400 payment?

A. I believe approximately \$1,000, I would say was the value of it. [36]

Q. Now, had it been bought for \$1,000, or had you made payments on it of \$1,000?

A. I bought it, I believe I gave \$1,200 for the whole setup, for all of it; that was the new price that I paid for it.

Q. And at the time it was repossessed how much did you owe on it?

A. I believe I owed \$900 on it.

Q. Now, besides the farming equipment did you have any other property which was disposed of between the time of the \$5,400 payment and the time of filing your petition in bankruptcy?

A. No.

Mr. Petermann: I have no other questions.

The Court: I would like to ask—do you have some questions?

Mr. Davis: I have some redirect.

The Court: Go ahead. No, I will wait.

Redirect Examination

By Mr. Davis:

Q. Mr. Inman, in the course of the recess did you have occasion to refresh your recollection on the subject of the amount of the value of the extras

(Testimony of James Thomas Inman.)

on the Porterville job due you at the time of the making of this \$5,400 payment?

A. The amount of the money that was due to me?

Q. Yes, on extras. [37] A. Yes.

Q. And do you wish then to change your testimony from what you testified to originally?

A. I would like to.

Q. And what is the corrected figure?

A. The \$5,400 and the \$763 was the total amount of money that was actually due on the change order of the Porterville project, as the balance of the money had been advanced, as payroll money on the project.

Q. How do you explain the discrepancy between your testimony now and your testimony on cross-examination?

A. The question was what was the total amount that was due me on the contract at the time we entered into the contract.

Q. Yes, and your explanation now is?

A. During the course of the contract part of the money was paid to me to carry the payroll and expenses on the project.

Q. Well, there was an offset in favor of Deeter for the money advanced for payrolls?

A. Yes.

Q. So is it a correct statement then to say that the \$5,400 which was paid by joint check to you and Keenan Pipe was the last amount of money that was due you on the Porterville job? [38]

(Testimony of James Thomas Inman.)

Mr. Petermann: For the extras?

Mr. Davis: Yes.

A. It was the total amount that was due me on the job.

Q. (By Mr. Davis): On the entire job, was there other money due you on the job in addition?

A. No.

Q. I see. Now, on cross-examination my notes indicate, and counsel can correct me if I am wrong, you estimated the value of your interest in your home at \$3,000? Am I correct in that?

The Court: According to my notes the witness indicated, I think, that his equity in his home was the difference between \$11,000 and \$15,000, or \$4,000. I don't recall anything on cross-examination on that subject.

Mr. Petermann: The Court is correct, I believe.

Q. (By Mr. Davis): Let me ask you this, Mr. Inman, if I put the question in this form, will your answer be any different than you testified on direct examination: What is your estimation of the fair market value at the time of this \$5,400 payment of your equity in your home?

Mr. Petermann: Your Honor, I am going to object now unless there has been a mistake shown, as the question has been asked and answered. [39]

Mr. Davis: It has been. I am merely giving the witness an opportunity to reanswer the question, because I don't think he understood it, your Honor.

The Court: Well, I don't know whether he did or not, but I will overrule the objection.

(Testimony of James Thomas Inman.)

Q. (By Mr. Davis): Do you understand the question?

A. The total amount or the contract price of the house we bought was \$11,300, and at the time that the house was repossessed we only had approximately \$600 in the house as equity, and at that time I figured the house would be worth \$15,000 on the open market if we could sell it. Of course, we couldn't sell it.

Q. Did you make attempts to sell the house prior to its repossession? A. Yes.

Q. And were you unsuccessful in finding a buyer for anything above the amount due on it?

A. Yes.

Q. Now, as to this \$769 check, on which you testified that Keenan Pipe was the sole payee, were there any prior transactions involving that same amount of money between you and Keenan Pipe and Mr. Deeter, the general contractor?

Mr. Petermann: During what period of time?

Mr. Davis: Immediately preceding the payment of the [40] \$769 check?

A. The preceding meeting we had we talked of the checks we had over the \$5,400 check.

Q. Was the \$769 check payable directly to Keenan Pipe the first such check issued for that amount?

A. I believe it was, the first check issued was paid to Keenan Pipe and Supply.

Mr. Davis: That is all.

(Testimony of James Thomas Inman.)

Recross-Examination

By Mr. Petermann:

Q. Mr. Inman, with reference to the house, did you build that house yourself or have it built for yourself? A. No.

Q. Did you install any—do any of the work on the house at all yourself? A. No.

Q. And how long did you live in the house?

A. I think we lived there approximately a year.

Q. And during that year's time did you make certain improvements in the property?

A. No.

Q. Did you install a lawn or flowers or anything of that kind? A. No.

Q. But by virtue of your having lived in it for that [41] time you thought your house was worth \$15,000? A. Yes.

Q. You think that was the fair market value for it?

A. According to what other houses were selling for.

Q. You do recall there were other houses, of comparable character in the neighborhood, that sold for that amount? A. No.

Q. From your observation as a contractor in Bakersfield, though, you felt that that was a fair amount? Is that correct?

A. No, not a fair amount, but what you could get out of the house.

Q. And you thought you could get \$15,000 out of

(Testimony of James Thomas Inman.)

it? A. We asked.

Q. And were you delinquent in your payments at the time this property was taken over?

A. Yes.

Q. And how long were you delinquent?

A. I believe three months.

Q. And was there actually a foreclosure of the property or did you turn it over to them voluntarily?

A. There wasn't a foreclosure on it.

Q. Was there some sort of proceeding on it?

A. The owner of the house just threatened to take me to court. [42]

Q. And did you give him sort of a document which prevented that? A. No.

Q. Well, do you know what transpired?

A. No, other than he told me if I didn't turn the house over to him he was going to take me to court.

Q. And did you then turn it over to him?

A. Yes.

Q. And so far as you know he filed no action against you? A. No.

Q. Did you receive any notification from any title companies with reference to your removal from the premises? A. No.

Q. The only notification which you received came from the owner of the contract himself?

A. Verbally.

Mr. Petermann: I think that is all.

Mr. Davis: I have nothing further, your Honor

(Testimony of James Thomas Inman.)

The Court: You testified that the \$5,400 check, using round figures, was post-dated I think?

The Witness: Yes, sir.

The Court: Posted-dated what, approximately a month?

The Witness: Yes.

The Court: What were the circumstances surrounding the [43] post-dating of the check?

The Witness: The review of it from the contractor that Keenan Pipe and Supply was putting pressure on him and bothering him in his office for the information as to when the money was coming in, and to relieve the pressure, when Mr. Deeter found out that the money was coming through from the State of California he post-dated the check and gave it to Keenan Pipe and Supply; it was post-dated a month ahead, and dated a month ahead to relieve him of the pressure.

The Court: Now, the other check for \$700 was a check from the general contractor directly to the Keenan Pipe and Supply?

The Witness: I believe it was.

The Court: Well, do you know how it happened that the check was made payable only to the Keenan Pipe and Supply instead of to you? The money was owing to you, as I understand it?

The Witness: Yes.

The Court: Do you know how it happened that the check was made only to the Keenan Pipe and Supply?

The Witness: Well, on the \$5,400 check the

(Testimony of James Thomas Inman.)

payees were made Keenan Pipe and Supply and myself, and they wanted me to endorse the check so that they could go right to the office with it, and I refused to endorse the check, because I wanted it to go through my records in my office, and they [44] took the check back to Mr. Deeter, and Mr. Deeter issued a check to Keenan Pipe and Supply, and on the same circumstances on the second check they went to Mr. Deeter and Mr. Deeter gave a check to them. The conversation I had with Mr. Deeter about the smaller check——

The Court: Now, Mr. Deeter is the general contractor?

The Witness: Yes, sir.

The Court: Was Mr. Keith, or some representative of the Keenan Supply there when you had the conversation with Mr. Deeter?

The Witness: No.

The Court: Well, now, do I understand that there was a \$5,400 check issued and made payable to both, and you refused to endorse it, and thereafter the general contractor made a check in the same amount payable only to the Keenan Pipe and Supply?

The Witness: Yes.

The Court: Which you didn't endorse?

The Witness: That is right.

The Court: Did you give Mr. Deeter any written instructions authorizing payment of the money to Keenan Pipe and Supply?

(Testimony of James Thomas Inman.)

The Witness: No.

The Court: I believe that is all I have.

Mr. Davis: I have nothing further from this witness, your [45] Honor.

Step down.

(Witness excused.)

Call Mrs. Inman at this time.

MRS. DOLLY INMAN

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name please.

The Witness: Mrs. Dolly Inman.

The Clerk: Have that seat there.

Direct Examination

By Mr. Davis:

Q. Your full name, please?

A. Dolly Inman.

Q. Where do you live, Mrs. Inman?

A. I live at 3131 South H.

Q. Are you the wife of Mr. James Inman?

A. I am.

The Court: In Bakersfield?

The Witness: Yes.

Q. (By Mr. Davis): Mrs. Inman, in the year preceding the filing in bankruptcy by Mr. Inman, did you assist him in any way in his business affairs?

(Testimony of Mrs. Dolly Inman.)

A. Well, I took care of the office as well as I could.

Q. You took care of the records and that sort of thing? [46] A. Yes.

Q. And you were then fairly well familiar with his business affairs? A. Yes, I was.

Q. In addition to being familiar with his business affairs, were you generally acquainted with all of the property in which he had an interest?

A. Yes.

Q. Do you recall that in the weeks or months immediately preceding his filing in bankruptcy that a check was issued on the Porterville job in the approximate amount of \$5,400? Do you recall such an occasion? A. Yes.

Q. How long would you say that was before the filing in bankruptcy?

A. Oh, about two months.

Q. At the time of the issuing of that check for \$1,500—strike that.

The Court: Was counsel in error as to the amount?

Mr. Davis: I beg your pardon, your Honor?

The Court: Miss Schulke, will you read the question?

(The question read.)

Mr. Davis: Yes.

Q. At the time of the issuing of the check for \$5,416, were you conversant with all of the assets that Mr. Inman had, [47] including moneys that

(Testimony of Mrs. Dolly Inman.)

were due him on jobs? A. Yes, I was.

Q. Could you state what those assets were?

A. Well, I can't recall, it has been quite a while.

Excluding the Porterville job.

Q. No, including everything.

A. I couldn't make a good estimate on that.

Q. No, I didn't ask you for an estimate, Mrs. Inman. I think my question was, do you recall what those assets were?

A. Oh, you mean assets?

Q. Yes.

A. I thought you meant all the jobs we had.

Q. No.

A. I am sorry. Well, we had about \$600 equity in our house, and, oh, we had our truck—we had two trucks and our car clear, and we had some stock in the plumbing shop.

Q. Stock in trade?

A. Yes, oh, \$2,500 or \$3,000 in stock, and we had our tools.

Q. What is your estimate of the fair market value, well, first of the tools?

A. Oh, I would say he had about \$1,000 or \$1,500 worth of tools.

Q. And your estimate of the fair market value of the three motor vehicles? [48]

A. Well, about \$1,000, \$1,200, something like that. I am not a very good judge of cars.

Q. Do you know what the amount, the total amount still due on the Porterville job was at that time? A. After the \$5,400?

(Testimony of Mrs. Dolly Inman.)

Q. At the time of the making of the payment?

A. I don't believe there was any balance.

Q. You mean the \$5,400 took care of it?

A. Cleared it up.

Q. Were there any other assets which Mr. Inman had an interest in at the time of the making of this \$5,400 payment?

A. None that I know of, and I took care of the books.

Q. Yes. Mrs. Inman, inviting your attention to the week immediately preceding the making of this \$5,400 payment, did you have any conversation with any member of the Keenan Pipe organization, or any agent thereof?

A. Yes, I did.

Q. Who was that conversation with?

A. Well, I received a telephone call from their credit manager.

Q. Do you know what his name is?

A. No, I don't.

Q. He represented himself to be the credit manager to you? [49]

A. Yes.

Q. What was said in that conversation?

A. He asked what we intended to do about our bill, and I said, well, we were doing the best we could, we were waiting for the Porterville job to come in and as soon as the money came in it was theirs, and he said he was afraid that wasn't good enough, and he would prefer we not ask or not try to charge, and he was more than a little insulting over the phone.

(Testimony of Mrs. Dolly Inman.)

Q. Well, try not to characterize what he said, just say what he said.

A. He just said that wouldn't be good enough, Keenan would have to take action against us.

Q. Did he say what kind of action?

A. No, he said they would take drastic measures.

Q. About when did this conversation take place in relation to the \$5,400 payment?

A. Oh, it was about two or three weeks before we got the money.

Q. Did you have any other conversations with any member of the Keenan Pipe Company organization before or after that time?

A. Well, in July, Mr. Keith came to see me and he asked me to give him a list of our jobs.

Q. Give him a list of the jobs—— [50]

A. Of the jobs we had.

Q. ——on which you had money coming?

A. Yes, and I told him I really——

Q. Just a moment. Where did this conversation take place? A. In my home.

Q. Who was present? A. Just myself.

Q. I see. And what was said by both of you?

A. Well, he asked for the list of the jobs and I told him I didn't have it handy right there, and that he would have to see Mr. Inman about that, and I gave him as much of an idea as I could how soon we could pay him. I told him that we were in pretty bad shape because this Porterville job hadn't paid off as much as we had expected it to and that if he would ride along with us that we would pay

(Testimony of Mrs. Dolly Inman.)

him just as soon as we could and assign as much of the money as it came in as we could and get it paid off, and he said that wasn't soon enough, that he had to have something more to go on than that, and he said he would look up our jobs and find out where they were and——

Q. Lien them?

A. ——lien them, and I said if he did that he would turn our contractors against us and we would not be able to get any more work and we wouldn't be able to pay him, and [51] he said regardless of that that was what he would have to do.

Q. Were there any other conversations in the week immediately preceding the \$5,400 payment with any member of the Keenan Pipe organization?

A. Well, several; they came almost every week and wanted to know when we would pay.

Q. Can you recall any conversation specifically?

A. Just wanted to know when they could get a payment.

Q. No, just a moment, Mrs. Inman. Do you recall any of those conversations specifically? Does any one still remain in your mind specifically?

A. No; well, just one, when Mr. Keith came to the office when our auditor was there, and our auditor——

Q. When did this take place?

A. This took place the latter part of June, and our auditor was there, and we discussed the Porterville project and all three of us came to the con-

(Testimony of Mrs. Dolly Inman.)

clusion that it couldn't be too much before we would be able to pay.

Mr. Davis: I apologize to the Court and counsel for the poor order of proof.

Q. Going back to the question of the assets and liabilities of Mr. Inman at the time of the \$5,400 payment, at that time do you recall, as of your own recollection, what the total amount of liabilities of Mr. Inman were? A. His liabilities? [52]

Q. The amounts of debts that he owed, or unsecured debts?

A. Well, I would say about \$21,000.

Q. Let's go into that in a little more detail. How do you break that down?

A. Well, we owed about \$5,000 in government taxes, and we owed Keenan Pipe and Supply about \$11,000.

Mr. Petermann: I am sorry, I didn't hear.

Mr. Davis: About \$11,000.

A. About \$11,000 I think we owed Keenan at that time, and then we owed \$1,800 to Tay Holbrook, and then we owed about \$2,300 to Burnison; owed \$1,100 to two different banks. Is that supposed to include personal?

Q. (By Mr. Davis): Oh, yes, any debts you had, whether they arose out of the business or not.

A. We were four months delinquent in our payments on the house, which were \$85 apiece, and we also owed back taxes on our house of about \$247. That is about all I can think of right now.

Mr. Davis: I have nothing further at this time

(Testimony of Mrs. Dolly Inman.)

The Witness: I haven't looked at our books in so long I can't remember. [53]

Cross-Examination

By Mr. Petermann:

Q. Mrs. Inman, who was your auditor to whom you referred in your direct testimony?

A. Quentin Winters.

Q. And did he keep your records and accounts for a period of time? A. Yes.

Q. During what period of time?

A. Well, he came to work for us in the fall of 1952—no, just a moment. He had worked for us about a year prior to our bankruptcy.

Q. And from 1952 to the summer of 1953 had he been with you all that time?

A. Yes, he had.

Q. Did he make periodic reports for you?

A. Yes.

Q. Were those reports in writing?

A. You mean financial statements?

Q. Yes.

A. No, he never did give us a financial statement. We were quite puzzled about that, but—well, he would give us superficial ones.

Q. Were they in writing?

A. Yes. I think so.

Q. What has become of them? [54]

A. I can't recall if he gave us one or not. I know he constantly promised to give us reports.

Q. Well, what did he do for you?

A. Well, he took care of our returns and checked

(Testimony of Mrs. Dolly Inman.)

my records and balanced them, and kept a general ledger.

Q. Now, you say he kept your general ledger?

A. Yes.

Q. And is that the ledger in which you kept records of payments of account? A. Yes.

Q. And you are testifying this morning from your recollection what those ledger entries contain?

A. To the best of my ability, I am.

Q. Did you keep any of those general ledgers yourself?

A. No, all I did was keep records and he would enter them for me.

Q. Well, do you have any memory with reference to these amounts other than what you saw in the general ledger?

A. I didn't quite understand that.

Q. Do you have any memory with reference to these items other than what you saw in the general ledger amounts?

A. No, I don't. I went completely by his figures.

Q. And when you testified with reference to the Keenan account being the sum of approximately \$11,000, is that because of your remembrance of that amount in the ledger? [55]

A. Yes. I don't remember exactly what the amount was.

Q. And as of what time did that \$11,000 amount appear for Keenan Pipe and Supply?

A. Well, let me see. It was before the \$5,400 was paid.

(Testimony of Mrs. Dolly Inman.)

Q. Now, with reference to the \$5,000 due in taxes, was that due at the time the \$5,400 payment was made, or was that the amount due at the time of filing in bankruptcy?

A. No, it was due at the time of the \$5,400.

Q. And what recalls that amount to you?

A. Well, mainly the amount given on the tax record that I have.

Q. Do you have a tax record with you?

A. No. That I had in the office. I know it was around \$5,000 we owed in taxes.

Q. Did you make your payment on the taxes after receiving the \$5,400 check and filing in bankruptcy, Mr. Inman filing in bankruptcy?

A. No, sir.

Q. Did you do any business between the time that the \$5,400 check was made and the time of filing in bankruptcy as a plumbing contractor?

A. Only in regard to finishing what work we had already started. We took on—I don't understand the question.

Q. Was your husband doing plumbing work between the time that the \$5,400 payment was made and the time of filing [56] in bankruptcy?

A. Yes, he was finishing what work he had out.

Q. Did he have any employees during that period of time?

A. Yes, he had one plumber working.

Q. Now, Mrs. Inman, did you ever give any one of the Keenan Pipe and Supply Company representatives a list of jobs which were then being done?

(Testimony of Mrs. Dolly Inman.)

A. Only orally.

Q. Now, with reference to the amount which was due on the Porterville job, do you recall what the total contract price on that job was?

A. No, I don't. There were several adjustments back and forth.

Q. Do you recall whether or not there was anything due on the contract itself at the time that the \$5,400 payment was made, as distinguished from the change work?

A. I don't believe there was. I don't remember.

Q. Do you recall you and your husband preparing a claim for filing with the State with reference to those change charges?

A. I don't understand the question.

Q. Do you recall preparing a statement for Mr. Deeter, or for the State of California, or anyone else, with reference to the amount of work which was done by your plumbing company with reference to the change over at the Porterville job? [57]

A. Well, we did make up a bill and a statement of what was done.

Q. Do you remember what the total amount of that claim was? A. No, I don't.

Q. If I suggested to you the figure of \$12,000 would that recall your memory?

A. I just don't remember; I am sorry.

Q. You were not paid for all the amount you claimed on the change orders, were you?

A. No, we weren't.

(Testimony of Mrs. Dolly Inman.)

Q. As a matter of fact, you only received a small percentage of that, did you not?

A. Yes, we did.

Q. And when I say a small percentage, only about 20 per cent of the amount which you claimed, is that correct?

A. I don't know what percentage we were paid.

Q. Would you say it was less than half?

A. I really wouldn't know. I merely just stayed in the office and my husband told me——

Q. Didn't you type up that statement for Mr. Deeter?

A. It is possible I did. Sometimes my husband typed the statements.

Q. Well, then, you don't know how much of that claim for extra work the \$5,400 check covered do you?

A. I don't know. I am sorry, I didn't understand you. [58]

Q. I say, you don't know of your own knowledge how much of your claim for the extra work on the Porterville job the \$5,400 payment represented?

A. I understood it was supposed to cover all of it.

Q. Did it cover your entire claim, or the amount which was allowed by the State?

A. I believe it was what was allowed; I am not sure.

Q. What I am trying to find out is how much was disallowed. Do you know what proportion was disallowed? A. No, I don't.

(Testimony of Mrs. Dolly Inman.)

Q. Do you recall that it was a considerable amount?

A. Well, my husband worked more closely with the accountant than with me on that job. They were trying to keep accurate records, and I just took care of the other jobs. I did what I could to help.

Q. Do you recall whether or not the \$5,400 payment represented more than—withdraw the question.

With reference to the \$700 payment, was that likewise a portion of the amount allowed on the extra work on the Porterville job?

A. I don't know. I don't think so. I don't recall.

Q. Do you know what that \$700 check purported to cover?

A. No, sir. I do not.

Q. As a matter of fact, Mrs. Inman, didn't you tell Mr. Keith that with the amount of the claim which you had [59] on the Porterville job that you were way out in front with reference to your payments?

A. We thought we had plenty coming in to pay Mr. Keith what—what we could take care of otherwise.

Q. And you told him so, did you not?

A. Well, we were sure that we would be all right on it, and—I just don't recall what my conversation was with him.

Q. But you were certain you would be all right?

A. Yes, we thought we would be all right on paying Mr. Keith. We certainly intended to pay him.

(Testimony of Mrs. Dolly Inman.)

Q. And at the time of the \$5,400 payment, there was still \$11,000 due to the Keenan Pipe and Supply?

A. After the \$5,400?

Q. Yes.

A. I don't know. Not that much.

Q. Well, was there \$11,000 due at the time, so after the payment there was only \$6,000 due? Do you recall which was correct?

A. I don't remember the figure. It is sort of vague.

Q. Well, now, when you thought you could pay them completely, did you have in mind paying \$11,000, or only \$6,000 to the Keenan Pipe and Supply Company?

A. Well, the details of it are kind of vague. I don't remember exactly what was due there on that Porterville job, but I know we felt our Porterville job would clear us with [60] Mr. Keith, of what we owed.

Q. And you felt at the time the \$5,400 check was paid to him?

A. I beg your pardon?

Q. And you had that feeling, that you had come to that conclusion at the time the \$5,400 check was paid to the Keenan Pipe?

A. I don't know what you mean.

Mr. Davis: I object to what this witness' private conclusions were.

The Court: Well, I think the objection should be overruled. I don't know whether the witness answered the question or not. Did you answer?

(Testimony of Mrs. Dolly Inman.)

The Witness: I didn't get a chance to.

(The question was read.)

The Court: The question may not be completely understandable because it refers back to the previous question.

Mr. Petermann: May I rephrase it?

The Court: Yes.

Q. (By Mr. Petermann): Mrs. Inman, you have stated you had a feeling that you would be able to take care of the account which was owed to the Keenan Pipe and Supply Company. Now, what I am inquiring about was, did you have that feeling that you could pay them completely at the time the \$5,400 payment was made? [61]

A. Yes, sir.

Q. And did that feeling or that conclusion arise from you knowing that certain sums were still due from the Porterville job?

A. No, it was just—we felt if given a little bit of time we could clear ourselves with Keenan.

Q. Did that feeling come from certain other jobs which you had under construction at that particular time?

A. I don't recall why I did make the statement.

Mr. Petermann: I have no further questions.

Mr. Davis: I have nothing.

The Court: We will recess now until 1:30 this afternoon.

(Thereupon, at 12:00 o'clock noon a recess was taken until 1:30 o'clock p.m. of the same day.) [62]

Monday, May 16, 1955, 1:30 P.M.

Mr. Davis: Your Honor, I wish to call Mr. John Deeter to the stand.

JOHN H. DEETER

called as a witness on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: John H. Deeter.

The Clerk: Have that seat there.

Direct Examination

By Mr. Davis:

Q. You are Mr. John H. Deeter?

A. Yes, sir.

Q. Where do you live, Mr. Deeter?

A. 622 Hillcrest Drive, Bakersfield.

Q. What is your occupation?

A. General contractor.

Q. In 1953 were you also a general contractor?

A. Yes.

Q. In the year 1953, Mr. Deeter, did you have any business dealings with Mr. James Inman?

A. Yes, sir.

Q. And did you have any with particular reference to the Porterville Hospital? [63]

A. Yes, sir.

Q. What was your relationship?

A. He was the plumbing subcontractor for construction of the State housing for the hospital, and

(Testimony of John H. Deeter.)

also subsequently putting in the utilities that weren't in the general contract.

Q. I see. And what was your business? Were you the general contractor?

A. I was the general contractor on the complete job.

Q. In the course of your construction of the Porterville State Hospital, did you have occasion to have any conversation with any representative of the Keenan Pipe Company? A. Yes, sir.

Q. And with whom did you have those conversations?

A. Most of them with Mr. Keith of the Keenan Pipe.

Q. And will you tell the Court when the first of those conversations occurred, as best you remember?

A. I would say shortly after the complete job was completed, which I would say was in March or April of 1953.

Q. And where did this conversation take place?

A. First over the phone, and then he came into the office.

Q. The first conversation you ever had was on the telephone? A. Yes.

Q. What was said at that time, Mr. Deeter, between you? [64] If you can't remember the words, give me the substance of the conversation.

A. We had so many, counsel, that I can't tell you. We had so many conversations, I mean there were three or four. His first call, I mean, was in

(Testimony of John H. Deeter.)

regard to getting—when he was going to obtain payment for the material used on the Porterville Hospital, and he was inquiring when it was coming through, when we would get our money, and in turn when he would get his money.

Q. In other words, you were looking ahead to see what arrangements would be made for the payment of the Keenan Pipe, is that correct?

A. Well, he called and wanted to know. He said he had been informed by the subcontractor, Mr. Inman, that he was going to get his money from that job, and Mr. Keith was verifying if he did have money on the job and when it was coming.

Q. State whether or not there was not an earlier conversation in which the question of the method of payment was discussed.

A. Not with me, no. In other words, there was no arrangement directly with me on it.

Q. Well——

A. The only thing, very early in the stage of the contract, it was agreed, but that was an agreement between [65] Jim Inman and myself, that the checks would be made jointly to Tom Keenan, and that was between Jim Inman and myself.

Q. So the first conversation which you now relate which took place, you think—I am sorry, my recollection fails me here.

A. I would say in March or April.

Q. March or April of 1953, was concerned with when the money would be forthcoming to pay the Keenan Pipe bill, is that correct? A. Yes.

(Testimony of John H. Deeter.)

Q. And what did you reply?

A. Actually, we had already disbursed the money for the material on the main contract; this was involving money for material that went on the change order on the state utilities.

Q. I see. And was that all that was said in the course of that conversation on the telephone?

A. Yes. Then it dragged out; we went into negotiations with the State on it, and it dragged out for quite a while, because they don't act very rapidly on change orders, and there was some disagreement as to the amount of the change orders, and we necessarily had to wait for the complete amount because they don't make progress payments on change orders; they do not pay until the complete amount is agreed upon, and that took quite a bit of time. [66]

Q. During that time did you have a further conversation with Mr. Keith, or any other representative of Keenan Pipe?

A. Just before we got a final settlement Mr. Keith came into the office.

Q. Was anybody else present?

A. At this conversation I don't think so. The credit manager might have been there, but I don't recall.

Q. When you say just before the final settlement, to what settlement do you refer?

A. I referred to the \$5,400 check.

Q. I see. What took place at this conversation—

(Testimony of John H. Deeter.)

withdraw that. What was said in the course of this conversation?

A. The actual words I don't remember, but I can say the substance of it was that Mr. Keith wanted to know how much money I still owed Mr. Inman. I told him roughly \$5,400. He said he was under the impression he was supposed to get closer to \$11,000 on the Porterville job. I told him no, that I had advanced enough money to make the payroll all along to Mr. Inman, under the terms of the original contract or agreement with him. I had to make all the payrolls because he didn't have the money at that time to pay the payroll, and they told me there was \$13,000 still due on the contract, and I said that couldn't possibly be because there wasn't \$13,000 that went on that particular job, [67] so he said he would go back and check out the records, and he came back and acknowledged the fact that \$5,400 would cover all the material that went on this job.

Q. On that particular job?

A. On the particular job, and agreed at the time if I would make a joint check out that there would be no lien filed.

Q. Had there been a conversation about a lien?

A. Never actually threatened, but it was implied. I mean, I got the idea we would have to—this bill would have to be paid or the job would be liened, because the job could have been liened. They couldn't file the notice until the change order had been completed and the job had been done three

(Testimony of John H. Deeter.)

months, you couldn't file notice of completion until the change order was completed.

Q. Well, at the time of this conversation was the word "lien" used?

A. I am not sure whether the actual word "lien" was used. In order not to have the job liened it was agreed I would pay this \$5,400.

Mr. Davis: I have no further questions.

Cross-Examination

By Mr. Petermann:

Q. Mr. Deeter, with reference to this \$5,400, do you now recall whether or not that was made by check to Mr. [68] Inman and to Keenan jointly, or whether it was made by check to Keenan alone?

A. My recollection is it was a joint check.

Q. Do you have any recollection with reference to the \$700 check, which was made at a subsequent time, as to whether or not that was paid to Keenan and Inman jointly, or to Keenan alone?

A. My recollection is that went to Keenan alone, but I could be wrong. I can obtain the documents, if necessary.

Q. You do have those documents?

A. I have those documents, yes.

Q. Do you have them with you?

A. No, sir.

Q. They are in Bakersfield?

A. In Bakersfield.

Mr. Petermann: I believe it is very material

(Testimony of John H. Deeter.)

that we should know that particular fact, your Honor.

Mr. Davis: What fact?

Mr. Petermann: And I believe we could ascertain whether they were made directly to Keenan, or jointly, with reference to the \$5,400 payment, and likewise the \$700 payment.

Mr. Davis: Well, what is your position? Maybe I agree.

Mr. Petermann: Well, I think if the payments were made directly to Keenan Pipe and Supply Company, then there is a serious question whether or not there could have been [69] a preferential payment, if the other factors are established.

Mr. Davis: I don't believe I have the checks, but the testimony was to the effect that the first one was joint and the second was made out to Keenan alone.

Mr. Petermann: Well, there was some conflict, my notes indicate, as between the testimony of Mrs. Inman and Mr. Inman. Mr. Inman, my notes show, testified the first check was made out directly to Keenan, and Mrs. Inman said the second check was made directly to Keenan. So I think we should ascertain, if it is possible, which of those situations is correct.

Mr. Davis: Well, now, these are Mr. Deeter's checks, aren't they?

The Court: Well, I understood Mr. Inman to say that the first check of \$5,400 made out some time in July, or delivered in July and post-dated

(Testimony of John H. Deeter.)

to August, was a joint check, and then he testified that the defendant Keenan Pipe and Supply Company wanted him to endorse the check but he refused to do so, and later Mr. Deeter issued a check in the same amount directed to Keenan Pipe and Supply.

Mr. Davis: Was that the \$5,400 check?

The Court: That is my understanding of his testimony.

Mr. Petermann: I now find with reference to the Court's inquiry that is what was developed, but with reference to my notes I had found it prior. I appreciate that, your Honor. [70]

Mr. Davis: That is correct, your Honor. That states the facts as Mr. Inman intended them to be stated.

The Court: Mr. Deeter, those cancelled checks that you issued are in your possession?

The Witness: They could be found.

The Court: They could be found.

Mr. Davis: Your Honor, I wish to point out, if the Court please, until there is some evidence here before the Court that there was an express or implied contract between Keenan Pipe and the general contractor, it would be somewhat unusual when there was a subcontractor in the picture, there is no materiality to the point.

The Court: Well, it seems to me that in view of the absence of records of any kind on the part of the bankrupt, and the amount of approximations that have been made in this case, both with respect

(Testimony of John H. Deeter.)

to dates and payments and what not, that the cancelled checks may be of some assistance at least in determining the exact dates upon which some of these things happened, and I am inclined to feel that if these documents are available that if counsel wants them they should be made available.

Mr. Davis: Very well, your Honor.

How could we arrange that, Mr. Petermann, so that they could be sent to the Court without the necessity of another appearance, if we can? [71]

Mr. Petermann: I will go farther than that. When you reach Bakersfield and have an opportunity to ascertain that fact from Mr. Deeter, I will accept your statement with reference to the facts.

Mr. Davis: And the checks?

Mr. Petermann: My impression at this point is that your statement is completely correct, the \$5,400 check and the \$769 check, as finally cashed were both made out to Keenan Pipe alone, if that will assist the Court. Mr. Inman now verifies that fact, and I don't know if there is any issue of fact remaining now.

The Court: Do you recall, Mr. Deeter, of an earlier check being issued in the amount of \$5,400 paid jointly?

The Witness: To be honest with you, I don't think I issued it. I don't think I would have issued it. The small check I might have, but I don't think the large check I would have issued.

The Court: So your distinct impression is that

(Testimony of John H. Deeter.)

the \$5,400 check was actually cashed as a joint check?

The Witness: That's right.

Mr. Davis: Well, maybe we better find out.

The Court: I think it would at least clear up this matter, and I am perfectly willing—do both of you gentlemen practice in Bakersfield?

Mr. Petermann: I am in Los Angeles. [72]

The Court: Oh. I was going to say that if you could send up a little written stipulation, stipulating what has been disclosed, why—I think it might be helpful for the Court if you could reproduce the face and the reverse side of the checks, giving dates and dates of cancellation and things of that sort.

Mr. Davis: I can photostat it.

The Court: You don't have to make photostatic copies.

Mr. Davis: Well, we have friends who will do the copying for us very reasonably.

The Court: Well, then, suppose that you gentlemen handle that that way, and stipulate that those matters might be received in evidence, and we will say as Plaintiff's exhibit?

Mr. Petermann: Yes, your Honor.

Mr. Davis: Yes, your Honor.

The Court: Very well.

Mr. Petermann: Just one other matter, Mr. Deeter, I was going to ask you about:

Q. You mentioned that there was some conversation with reference to not filing liens at the time

(Testimony of John H. Deeter.)

the \$5,400 check was made. Now, can you tell me what you said in respect to that conversation?

A. Exactly what I said I don't know, but I know that I was not going to release the money that I had until I was [73] assured—I knew Keenan Pipe had supplied all materials on the job, and I would not release the money until I was satisfied it was paid.

Q. And so you received some assurance that there would be no lien filed on behalf of the Keenan Pipe and Supply?

A. Definite assurance as far as I was concerned.

Q. Did you assure yourself that there would be a proper lien for this sum of \$5,400, or that there could be a proper lien for that amount?

A. I would say in the approximate amount. The figures weren't very far off; they might have varied a few dollars, but I think it was in the actual amount.

Q. Now, with reference to the \$700 check which was, according to my records, delivered subsequent to this \$5,400 check, was there some conversation which preceded the delivery of that check?

A. That was material on another job.

Q. I didn't understand.

A. That was material on another job, or two or three small jobs in town, I know at least one job in town. It had nothing to do with this original contract.

Q. In other words, that had nothing to do with the Porterville job?

A. That is correct.

(Testimony of John H. Deeter.)

Q. And were there valid claims of liens which could be [74] filed against those jobs?

A. Yes, sir.

Q. And did you have some conversation with reference to the possibility of those liens at the time you made out this \$700 check? A. Yes.

Q. And can you tell us when that was with reference to the delivery of that check?

A. I would say within two or three days prior to the delivery of the check.

Q. And that conversation was held at your office, or someone's office?

A. That possibly could have been held at my office; they were either at my office or over the phone.

Q. Do you remember who was present besides yourself? A. Just Tom Keith.

Q. Do you remember what was said by you and by him?

A. Just the general idea, Mr. Petermann; I don't remember the exact words again.

Q. Did I understand correctly that the \$5,400 was very close to the amount of the materials which remained unpaid on the Porterville job at that particular time?

A. When you say at that particular time, you mean after the job completion? We had the job completed about 90 days when this was made. [75]

Q. In other words, when this payment was made the job had been completed? A. Yes, sir.

(Testimony of John H. Deeter.)

Q. And do I understand correctly the fact to be that the payments which were now being received were not for materials but were for change orders which had been performed by Mr. Inman?

A. Portions of that payment was ten per cent retention which the State holds which was \$1,000 on the original contract, the balance of it was what he had coming on a change order.

Q. Now, do you recall whether or not the filing of his claim for those change orders was handled through your office, or did he handle that directly with the State?

A. Handled through my office.

Q. Do you recall what the amount of that original claim which was filed through your office was?

A. The original claim as turned in to the State was very close to \$13,000, somewhere between twelve eight and twelve nine.

Q. Do you remember approximately when that claim was filed with the State?

A. Roughly ten weeks before acceptance of this final—it was shuttled back and forth between Sacramento, I believe, and it took about three weeks every trip. [76]

Q. Was there an amended claim filed after the first \$13,000?

A. The first claim, there were pipes and pipe sizes and material some time that the inspector right at the job could not allocate to the job, some pipe sizes that had inadvertently got in there and

(Testimony of John H. Deeter.)

they wouldn't even let the pipe on the job, and the State rejected it and the State said send in corrected copy, and then he submitted again and they objected again, and it was reduced down from around \$13,000—I meant twelve eight. Originally it was reduced from \$13,000 to \$10,000; they reduced about \$3,000 approximately as originally submitted.

Q. Now, when this \$5,400 came down from the State, was the last payment on the claim which was filed with them? Before you answer that, first, had there been a prior payment on that claim made to your office? A. Yes, sir.

Q. And would that have been in the neighborhood of \$4,600?

A. Let me correct it. What actually happened, as I explained before, that was ten per cent retention on the first contract, which was originally around \$10,000. They held out that \$1,000. The other \$4,400 came down on this change order, and the balance of it I had advanced the balance of that money. We got it all in one lump sum, over \$9,000, [77] close to \$10,000, but of the balance of that I had advanced Mr. Inman for payroll and incidentals on the job, because he said he couldn't carry the job, and he was already on the job. He originally went on the job anticipating the \$10,000 contract, and he wound up with \$20,000, and there was no progress payment on the last and we had to carry him one way or the other. Keenan agreed to carry the material and I agreed to carry the labor.

(Testimony of John H. Deeter.)

Q. And so the difference between what Keenan received and the amount of the net claim was covered by the advances which you had made?

A. That is correct.

Q. And so those proceeds were retained by you?

A. That is correct.

Mr. Petermann: I have no further questions.

Mr. Davis: Your Honor, I have nothing further.

I am still feeling my way in matters of federal procedure, and I don't know whether this is necessary for my record or not, but purely for the record I would like to move that all testimony given by this witness pertinent to the subject of whether or not a lien was waived should be stricken, on the ground it is irrelevant, incompetent and immaterial.

The Court: Well, I think the motion will be denied.

I would like to ask a couple questions. Mr. Deeter, [78] the main subcontract of Inman to supply the plumbing and the housing part of the general hospital contract——

The Witness: That is right.

The Court: ——that was for some \$10,000?

The Witness: That is correct.

The Court: And that contract was completed, is that true, in April or May, fully completed?

The Witness: That and also the other phase was completed too. Everything was completed. We delivered the house at that time.

The Court: Well, was the installing of the utili-

(Testimony of John H. Deeter.)

ties, was that a change order in the main contract or was that a separate contract?

The Witness: It was a change order in the main contract; it was done on cost-plus. It was not a fixed fee.

The Court: Well, when you filed the claim, or the claim was filed on behalf of Mr. Inman, of the main contract, leaving out the change orders, all that that claim included was the ten per cent retention?

The Witness: Correct.

The Court: Everything else had been paid?

The Witness: That is correct.

The Court: And the amount of the change order as finally agreed upon between you and Mr. Inman and the State was agreed upon somewhere around \$9,000? [79]

The Witness: Closer to ten.

The Court: Closer to \$10,000. And then of that \$10,000 that was received Keenan Pipe and Supply received the \$5,400?

The Witness: Correct.

The Court: Which covered all of the material furnished by that company that went into the Porterville job?

The Witness: Yes, sir.

The Court: Now, was this——

The Witness: That was not all the material. They had been paid previously to that for material that went into the plumbing.

(Testimony of John H. Deeter.)

The Court: Yes. In other words, it was the balance of the material?

The Witness: Yes.

The Court: Well, now, was this check of \$5,400 issued by you before the claim had been honored and you had received a check from the State, or Inman received a check from the State?

The Witness: The check came to me. Not before it was honored, not before they had accepted the change order, not before we had all three come to the agreement as to what was being paid.

The Court: But the point is this, did you issue the check in advance of having in your hands the funds from the State?

The Witness: Correct. [80]

The Court: And do you remember how much in advance?

The Witness: No, sir. I have those records.

The Court: Well, was it maybe as much as thirty days?

The Witness: I don't think so.

The Court: Well, why did you issue the check before you had funds in your hands from the State?

The Witness: I guess, actually my memory doesn't stand me in this, I am not positive why, but the only reason I can see—and I am not sure this is why, but the only reason I can say why is because if Inman and Keenan had been pushing for their money I might have. I actually don't think I post-dated the check, but they tell me it has been proven

(Testimony of John H. Deeter.)

that I did post-date it and possibly I did, but I did not believe so.

The Court: Well, you are satisfied though that the check was issued before you received the funds from the State?

The Witness: Yes, I am satisfied.

The Court: And the only reason that you can think of now——

The Witness: I knew once that change-over was approved I knew I would get the money, but there was still a question as to the amount, until they finally approved it by all three parties.

The Court: Well, do you recall anything being said about not filing a lien if you gave the check at that time, even [81] though you didn't have the money?

The Witness: That could have been the reason I issued the check, and probably was as you bring it to mind. After they file notice of completion there is a thirty-day waiting period. They had to be protected in some manner that they would have their money, and so possibly that is the reason I issued the check. They had to be protected some way and I thought it was the simplest way to protect them, to let their lien rights expire. The date will probably bear that out.

The Court: I think I have no further questions.

Mr. Davis: With the indulgence of the Court, I have.

The Court: Yes, indeed.

(Testimony of John H. Deeter.)

Redirect Examination

By Mr. Davis:

Q. Mr. Deeter, after your original conversations with Mr. Keith on the subject of the change order and how the payments were going to be made, tell the Court whether he made further inquiry up until the time of the final payment made to him? Did he ever telephone you regarding these payments?

A. Counsel, what was your first date again?

Q. Your first conversation was when you negotiated for the work under the change order, you have told us about that. Now, would you tell us about any later personal or telephone [82] conversations that you had with Mr. Keith concerning this money that was coming on this job?

A. I think he telephoned once or twice, checking to know why it took so long, called to know when the money would be coming in.

Q. You say he called once or twice during that period to inquire? A. I would say so.

Mr. Davis: I have nothing further.

Mr. Petermann: That is all.

Mr. Davis: May this witness be excused?

The Court: Mr. Deeter, if you will arrange to make available on request of Mr. Davis and Mr. Petermann these cancelled checks involved, you are excused from further attendance.

The Witness: Thank you.

(Witness excused.)

Mr. Davis: There is one further bit of the trustee's *prima facie* case I can offer, and counsel may stipulate, regardless of what the position of solvency may have been at the time of the payments, as a matter of fact the estate will not be able to pay 100 per cent dividend. There are roughly \$3,300 on hand as of now, and it looks to me from the claim file about \$20,000 in claims to pay, so that even if we were completely successful in this action we still could [83] not pay 100 per cent dividend out of the estate. Now, I could so testify.

Mr. Petermann: I will stipulate Mr. Davis would testify in accordance with his statement.

The Court: May I inquire, when you speak of \$30,000 in claims, are you talking about unsecured claims?

Mr. Davis: Your Honor, there is a secured claim in there which I deducted, because it obviously should not have been listed in the form it was. If I said \$30,000 I was in error; I should have said about \$20,000.

The Court: In effect, that \$20,000 is in unsecured claims?

Mr. Davis: Yes. And there is no possibility, your Honor, even if this action is successful, in paying 100 per cent dividend.

Mr. Petermann: May I inquire, is any of that amount, that \$20,000 amount, represented by taxes?

Mr. Davis: Yes.

Mr. Petermann: In what amount?

Mr. Davis: It is on this sheet and I probably should have read from this summary and not from

memory anyway. Taxes due the United States \$4,590; taxes due the State thirty-nine thousand and forty-four—I am sorry, \$39.44. \$300 which are listed as being as priority under the laws of the United States, I haven't looked at the claim itself to see what they are relying on. Secured claims, it says \$22,909, [84] and unsecured claims \$11,738, but in making the representation I did, there are elements in this security instrument which obviously indicate that they were mislisted in the schedule. In any event, your Honor, even taking it at its most, we couldn't conceivably pay 100 per cent dividend, because if you subtract the taxes due the State and the \$4,500, it more than wipes out all that we now have in the estate, and if we were completely successful in this action there would be what? Some \$5,000, yes, a little over \$5,000 and the \$5,000 could not possibly pay even as they have listed in the schedule \$11,000 of unsecured creditors.

Mr. Petermann: Mr. Davis, may I inquire, according to my memorandum, the secured claims amount to \$11,909.99.

Mr. Davis: I see what happened. This was not corrected in the summary, but it was corrected in the original.

Mr. Petermann: So that the total of the claims, general creditors, only amounts to \$22,000 roughly, is that correct?

Mr. Davis: Yes. In any case, no matter how you cut it it would be impossible to pay 100 per cent dividend in any case.

The Court: Well, I think in view of the colloquy

between attorneys, and what not, we might restate the stipulation using the corrected figures, and, Mr. Petermann, you see if you can go along with the proposed statement.

Mr. Davis: Your Honor, I would rather not use the [85] schedule of the bankrupt, but I would rather rely on the personal representation, which is based on my conversations with the bankrupt, my own knowledge of the estate, because there are errors in the schedules.

My representation, and I would so testify, is this, your Honor, that even if the trustee is completely successful in this lawsuit, and recovers the total amount claimed thereunder, it would be impossible for the estate to pay a 100 per cent dividend after paying the priority claim of the United States.

The Court: Well, I think I would also prefer to have you include in the stipulation the status of the bankrupt estate with respect to the unsecured creditors.

Mr. Davis: There are \$3,300 now in the estate, and there is at least \$11,000 of unsecured creditors.

Mr. Petermann: May I make one inquiry? Your statement at this point says even if we prevailed in this particular action.

Mr. Davis: Which is not necessary to establish, but I thought I might as well bring it in to conclude the matter. I think actually, if you got down to that, I would be allowed to leave that asset out in making the representation, but just to preclude that I have it included as an asset, assume that it is an asset.

Mr. Petermann: Then I think we should inquire as to [86] what other assets there may be.

Mr. Davis: Oh. \$3,300, and this is the last remaining possible asset in the estate. There are no other recoveries to be made.

Mr. Petermann: To be determined at this particular time?

Mr. Davis: Well, yes. I can tell it to you about as positively as can be stated. If there are assets which the bankrupt has concealed, or something, it could modify that, but we have traced down all of the causes of action that are possible, and this is the last remaining possible asset today.

The Court: And you have reduced to cash all other unliquidated——

Mr. Davis: Yes, your Honor.

The Court: And also you have reduced to cash any physical assets which you had?

Mr. Davis: We have, a considerable number, your Honor, although they were heavily encumbered and brought very little cash for that reason.

Mr. Petermann: With reference to this particular testimony, I deem it to be irrelevant inasmuch as I think the issue to be determined is the amount which could have been realized proportionately by the other creditors at the time these payments were made. This may have some force and effect, but it certainly doesn't go along with the code [87] section itself, which says that it must be, in order to be a preference, more than a proportionate share, with reference to other creditors in the same class; in other words, relating to the

time of payment rather than the time of the filing in bankruptcy and the liquidation and the diminution of the assets through the bankruptcy procedure.

Mr. Davis: Your Honor, this matter has been ably litigated, and——

The Court: I might state that my own feeling was that Mr. Petermann's objection really goes more to the weight to be given to the testimony than to the relevancy.

Mr. Davis: If I may respectfully suggest, your Honor, if Mr. Petermann's position is correct, his objection would be well taken as a point of law, and therefore I would like to decide it on that basis.

I wish to bring to your Honor's attention, if I may, the case of Palmer Clay Products Co. vs. Brown, 297 United States 227, in which this issue was discussed, and as a further citation, Collier on Bankruptcy 60.35, in which this entire issue was dealt with at some length, and I believe that the Court will find—if the Court wishes I can read an excerpt from that Supreme Court case now, if the Court wishes to rule at this time. It seems to me to be conclusive.

The Court: Yes. Go ahead. [88]

Mr. Davis: "The petitioner contends that a creditor who receives a part payment of his claim does not receive a preference, although he has reason to believe that the debtor is insolvent, provided the debtor's assets at the time of the payment would, if then liquidated and distributed, be sufficient to pay all the creditors of the same class an equal proportion of their claims.

“Whether a creditor has received a preference is to be determined, not by what the situation would have been if the debtor’s assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but by the actual effect of the payment as determined when bankruptcy results.”

And it goes on to expound on that subject, but I submit unless there is later United States Supreme Court authority that that would be conclusive.

Mr. Petermann: May I suggest to the Court, in that connection that there are several other authorities which are in conflict with the excerpt which counsel has read, and particularly the case of *Haas vs. Sachs*, in 68 Fed. (2d) 62; likewise in the case of *Peck vs. Whitmer*, 231 Fed. 893; and the case of *Mansfield Lumber vs. Sternberg*, in 38 Fed. (2d) 615. The basis and the reasoning in all of those is just [89] this, that the disproportionate amount must be determined as of the time of the payment, not as what has happened subsequent to that time, and may have resulted in a bankruptcy action having intervened and the liquidation which may have taken place by virtue of the bankruptcy proceedings.

The Court: Well, it is my recollection of the record, did we get down to a stipulation as to the matters stated by Mr. Davis, reserving on your part your objection to relevancy and materiality?

Mr. Petermann: I believe we are in accord with

reference to those particular facts, your Honor. I might restate them so I am sure I have them.

The Court: Well, I don't think the record is entirely satisfactory because of the colloquy intervening each time, and I would like to have a clear-cut statement.

Mr. Davis: Perhaps Mr. Petermann, as he suggested, would state his understanding of it and that may conclude it.

The Court: Yes.

Mr. Petermann: I will be glad to state my understanding of it, and that is that the total amount of the secured claims on file that have been listed in the bankruptcy schedules is \$11,909.99; that there were unsecured claims listed of \$11,738.21, which would make a total of \$23,648.20. That does not include the amounts which were listed as due to the United States for taxes, in the sum of \$4,590.50, nor [90] the sum which is due the State of California by virtue of taxes in the sum of \$39.44; nor does that include debts listed as having priority in the sum of \$300.

The Court: Well, do you go further with respect to the statement of Mr. Davis that the total assets of the bankrupt estate amount to \$3,300 in cash; that all unliquidated claims have been liquidated except this claim; that all of the tangible, intangible property has been disposed of?

Mr. Petermann: I am willing to stipulate to that, if that is his testimony.

Mr. Davis: Yes, that was so stated, your Honor.

The Court: All right. Well, now, Mr. Davis, do you accept the statement of Mr. Petermann?

Mr. Davis: I do, your Honor.

The Court: Well, then, those matters are covered by your stipulation, which stipulation is accepted by the Court, and they were accepted subject to Mr. Petermann's objection as to materiality and relevancy, which objections at the present time I will overrule.

Mr. Davis: Your Honor, the trustee rests.

Mr. Peterman: May it please the Court, I have just two matters which I wish to introduce, and I have a witness here for that purpose, primarily as to the amount which was due the Keenan Pipe and Supply Company at the particular [91] time these payments were made, and perhaps we can stipulate again if Mr. Keith were to testify he would say these were the amounts due. The amount which was due on August 10, 1953, was the sum of \$13,306.08.

The Court: \$13,800—

Mr. Petermann: \$13,306.08, your Honor. Parenthetically, your Honor, the payment which was received on that date therefore was credited after that time, leaving a balance of \$7,889.45.

The balance due as of September 8, 1953, prior to the application of the \$700 payment, was \$7,928.90 and after the application of the \$769.01 payment that left a balance of \$7,159.89.

Mr. Davis: I will so stipulate.

The Court: Well, the stipulation is accepted by the Court.

Mr. Petermann: That is all.

The Court: You have nothing further?

Mr. Petermann: I have nothing further.

The Court: Well, now, gentlemen, we are going to receive into evidence the checks, the cancelled checks belonging to Mr. Deeter. Now, do you gentlemen want to submit any further briefs on the matter, or argue the matter?

Mr. Petermann: At the convenience of the Court, I would [92] be willing to prepare a short brief with reference to it if it would be helpful.

The Court: Well, I am inclined to feel that it would be helpful.

Mr. Davis: Would your Honor like us in the brief to cover reargument of the facts, or merely on some specific points of law?

The Court: I think you might give your version of the facts. I don't think you need particularly to argue them. Then I think that I would appreciate having you cover the point raised by Mr. Petermann concerning the time element that is important in determining whether or not there has been a preference.

Mr. Davis: I take it that the Court would probably like to receive some law also on the subject of the effect of this purported waiver of security.

The Court: I rather gather, Mr. Petermann, you might raise that point on your brief so I think that it would be helpful if both counsel would do so.

Now, as to the time, when do you feel, Mr. Davis, you being counsel for the plaintiff, what time would you reasonably require?

Mr. Davis: I wonder if 10, 10 and 5 would be agreeable.

Mr. Petermann: It would be entirely agreeable to me if it is with the Court. I do have in mind I will be in [93] trial about five days next week, and if you should get your brief in real early I might be hard pressed for time.

The Court: Well, if you will advise the Court that you are, I don't think you will have any difficulty getting additional time.

Mr. Davis: I have a referee who is on my back with a whip lash to get this estate closed, your Honor, otherwise——

The Court: Well, let's make an order that briefs are to be submitted on the basis of 10, 10 and 5 and the matter will then stand submitted after the filing of the last brief.

Mr. Davis: Thank you, your Honor.

Mr. Petermann: Thank you, your Honor.

The Clerk: Those checks are going to be given a number when they are received?

The Court: I am not sure, do you think they will come in the form of a photostat?

Mr. Davis: Yes, your Honor, I will have them photostated, and send one copy to counsel and one copy to the Court.

The Court: Well, then the earlier dated check will be Plaintiff's Exhibit 1 and the later dated check will be Plaintiff's Exhibit No. 2, and they will be marked accordingly by the Clerk when they arrive.

(The checks referred to when received are to be marked Plaintiff's Exhibits 1 and 2, and received in evidence.)

37

August 19, 1953

00-1435
1211

James Thomson, Jr. and
Co.

85.416.

dis

Klein : Geo. S. Kupp

EMPLOYMENT HEREOF BY A FEE-EMPLOYEDS PAYMENT IN FULL OF ACCOUNT ITSMIZED ABOVE

JOHN H. HARRIS
OFFICE 5416 DALS 63 CTS

DOLLARS

BAKERSFIELD BRANCH:

**SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES**

JOHN H. DEETER

90.1435
1211

BAKERSFIELD, CALIF.

Mr. John A. Reester

James G. Thompson
Rochester, New York

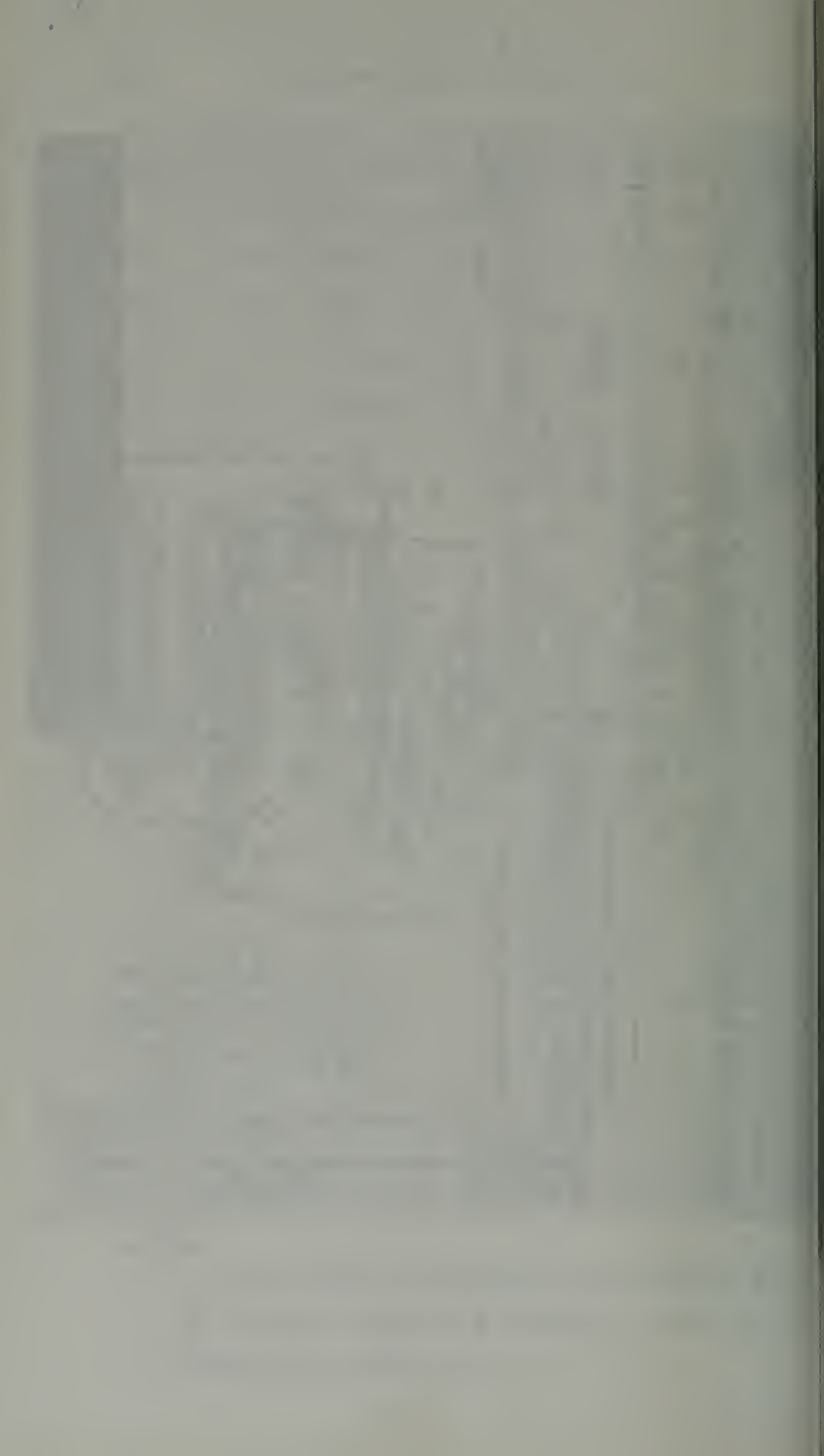
Bank of America
NATIONAL SAVINGS ASSOCIATION
KEENAN PIPE and SUPPLY CO
372-2875

PAY TO THE ORDER OF ANY
BANK BUNKER OR TOLSON

LOS ANGELES, CALIFORNIA

BANK OF AMERICA
90-139 BANK OF AMERICA
90-139 BANK OF AMERICA

OR THRU LOS ANGELES CLEARING HOUSE ASS'N
ALL PRIOR ENDORSEMENTS GUARANTEED



H. James
 J. P. Brown
 Staff Secretary
 1000 10th St. N.W.
 Wash. D.C.

PAY TO THE ORDER OF

Sept 4, 1953 90-1435
 1211
 7/19 01
 Bakersfield, Calif.

ENDORSEMENT METHOD BY DEPOSITOR REQUIRED TO FULLY VALIDATE THIS CHECK

90-1435
 1211
 709 DOLS 01 CTS

DOLLARS

BAKERSFIELD BRANCH

SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES

90-1435 2130 CHESTER AVENUE

1211

BAKERSFIELD, CALIF.

JOHN H. DEETER

John H. Deeter

PAY TO THE ORDER OF

BAKERSFIELD BRANCH

ALL DEPOSITS GUARANTEED

SEP 8 1953

SEP 8 1953

SEP 8 1953

SEP 8 1953

SEP 8 1953

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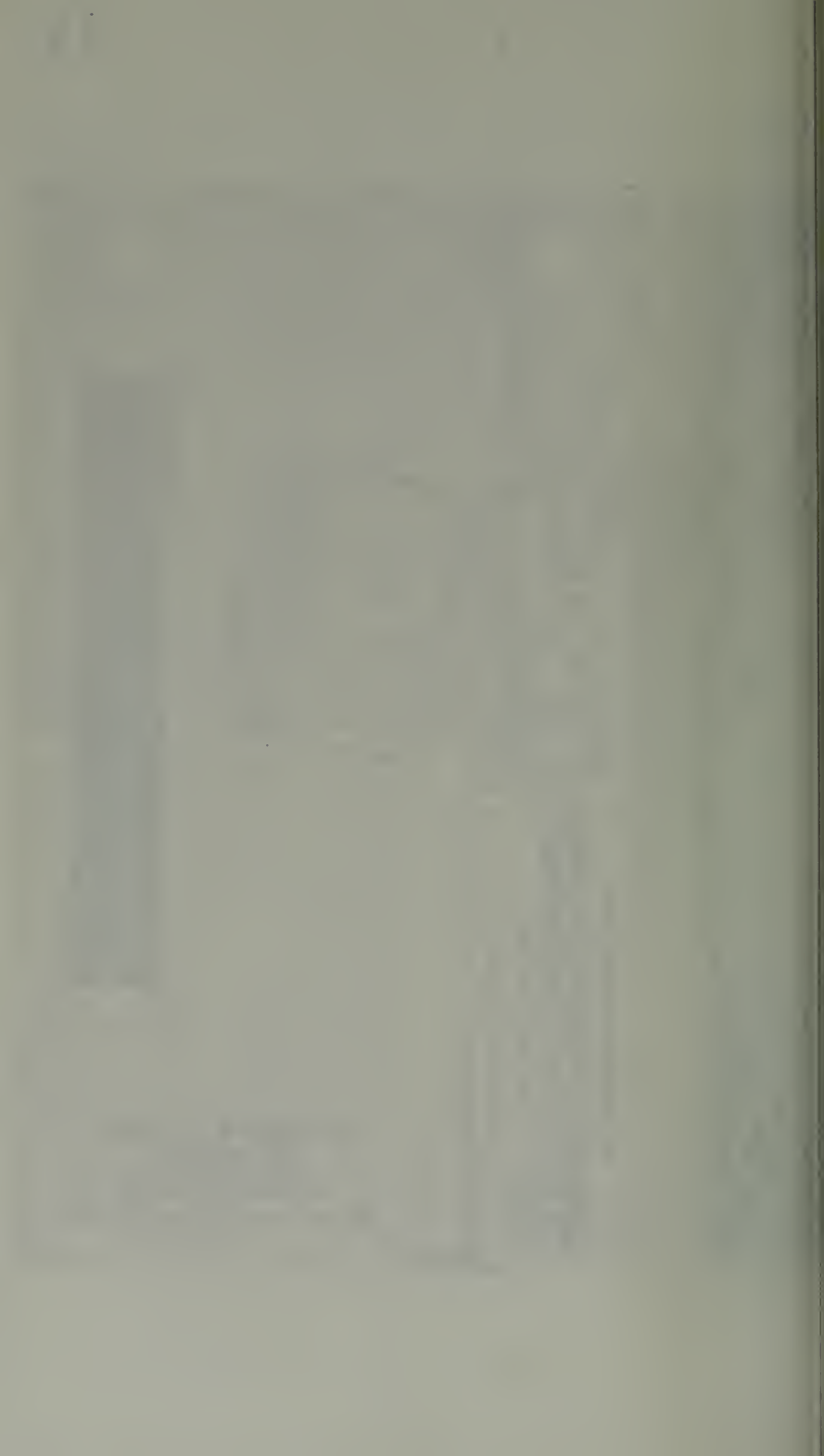
SEP 8 1953

SEP 8 1953

SEP 8 1953

PAY TO THE ORDER OF 419
 Bank of America
 NATIONAL TRUST ASSOCIATION
 For Deposit Only
 KEEMAN PIPE & SUPPLY CO.

PLAINTIFF'S EXHIBIT NO. 2
 Admitted in evidence May 16, 1955.



Mr. Davis: Thank you, your Honor. [94]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Fresno, California, this 15th day of October, A.D. 1955.

/s/ HELEN G. SCHULKE,
Official Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 17, inclusive, contain the original:

Complaint.

Answer.

Findings of Fact & Conclusions of Law.

Judgment.

Notice of Appeal.

Request for Clerk's Transcript.

which, together with 1 volume of Reporter's Transcript of Proceedings and Plaintiff's Exhibits 1 & 2 constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this 21st day of October, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 14913. United States Court of Appeals for the Ninth Circuit. Keenan Pipe & Supply Company, a Corporation, Appellant, vs. B. E. Shields, as Trustee in Bankruptcy of James T. Inman, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed October 24, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
Ninth Circuit

No. 14913

KEENAN PIPE AND SUPPLY COMPANY, a
California Corporation,

Appellant,

vs.

B. E. SHIELDS, as Trustee in Bankruptcy of
James T. Inman,

Respondent.

APPELLANT'S POINTS AND DESIGNATION
OF RECORD

Comes now the above-named appellant, Keenan Pipe and Supply Company, a California corporation, and herewith sets forth the points on which it intends to rely on the appeal of this cause, to wit:

I.

That the subcontractor was not insolvent at the time that payments were made by the general contractor to subcontractor and materialman by joint check.

II.

That payments by general contractor to materialman did not result in diminution of the subcontractor's estate.

III.

That payment by general contractor of amount due materialman with knowledge and consent of

subcontractor during period in which materialman had a lien against contractor and subcontractor did not constitute a preference.

IV.

That payment by general contractor of amount due materialman with knowledge and consent of subcontractor during period in which materialman had a lien enforceable by "stop notices" against contractor and subcontractor did not constitute a preference.

Designation of Record to Be Printed

Appellant hereby designates and respectfully requests the Clerk of the above-entitled Court to cause to be printed the following portions of the Transcript of Record on Appeal, to wit:

1. Complaint.
2. Answer.
3. Findings of Fact and Conclusions of Law.
4. Judgment.
5. Notice of Appeal.
6. Request for Clerk's Transcript; and
7. Reporter's Transcript of Proceedings, together with Plaintiff's Exhibits 1 and 2.

Respectfully submitted,

/s/ JOHN B. PETERMANN,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 2, 1955.

TOPICAL INDEX

| | PAGE |
|-----------------------------------|------|
| Statement as to jurisdiction..... | 1 |
| Statement of case..... | 2 |
| Specification of error..... | 6 |
| Summary of argument..... | 7 |
| Argument | 8 |

I.

| | |
|---|---|
| No voidable preference by extinguishment of lien..... | 8 |
|---|---|

II.

| | |
|---|----|
| Obligation paid was not an antecedent debt..... | 16 |
|---|----|

III.

| | |
|--|----|
| Finding of insolvency not supported by the evidence..... | 16 |
|--|----|

TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|---|--------|
| Bates v. Santa Barbara County, 90 Cal. 543, 27 Pac. 438..... | 10 |
| Goldtree v. City of San Diego, 8 Cal. App. 505, 97 Pac. 216..... | 10 |
| Jackson v. Flohr, 119 Fed. Supp. 305..... | 14, 18 |
| Johnson v. Root Mfg. Co., 241 U. S. 160..... | 14 |
| Malott & Peterson v. Street, 4 F. 2d 770..... | 10 |
| McCluer v. Heim-Overly Realty Co., 71 F. 2d 100..... | 12 |
| San Mateo Feed & Fuel Co. v. Hayward, 149 F. 2d 875..... | 17, 19 |
| Stickney v. General Electric Co., 44 F. 2d 362..... | 13 |
| United States Fidelity and Guaranty Co. v. Sweeney, 80 F. 2d 235 | 11 |

STATUTES

| | |
|---|-------|
| Bankruptcy Act, Sec. 24 (11 U. S. C. A. 47)..... | 2 |
| Bankruptcy Act, Sec. 60(a) (11 U. S. C. A. 96(a))..... | 16 |
| Bankruptcy Act, Sec. 60(b) (11 U. S. C. A. 96(b)) | 2, 6 |
| Bankruptcy Act, Sec. 67 (11 U. S. C. A. 107) | 7, 19 |
| California Code of Civil Procedure, Sec. 1190.1..... | 3, 10 |
| California Code of Civil Procedure, Sec. 1193.1 | 4 |
| California Code of Civil Procedure, Title IV, Chap. II..... | 9 |
| California Constitution, Art. XX, Sec. 15..... | 9 |
| United States Code of Judiciary and Judicial Procedure, Sec. 1291 (28 U. S. C. A. 1291)..... | 2 |

TREATISE

| | |
|--|----|
| 6 American Jurisprudence, Bankruptcy, Sec. 1085..... | 14 |
|--|----|

No. 14913.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KEENAN PIPE & SUPPLY COMPANY, a corporation,

Appellant,

vs.

B. E. SHIELDS, as Trustee in Bankruptcy of James T.
Inman,

Appellee.

BRIEF FOR APPELLANT.

Statement as to Jurisdiction.

Appellee B. E. Shields, as Trustee in Bankruptcy of James T. Inman, Bankrupt, commenced this action in the District Court of the United States in and for the Southern District of California, Northern Division, against appellant Keenan Pipe & Supply Company, a California corporation, to set aside an alleged voidable preference and to recover from appellant the sum of \$9,223.03 which had been paid to appellant with interest and costs of suit [T. R. 3-4].

Appellant filed its answer acknowledging the receipt of said moneys but denied the alleged preference and by separate defenses alleged that said moneys were received by it in satisfaction of its materialman's liens [T. R. 5-9].

Judgment was entered on July 12, 1955, in favor of appellee and against appellant in the sum of \$6,185.64 principal, interest in the sum of \$541.24 and costs of suit in the sum of \$68.30 [T. R. 12]. Appellant's Notice of Appeal was timely filed on August 2, 1955 [T. R. 13] and an Undertaking for Cost Bond on Appeal was filed on August 11, 1955.

The District Court had jurisdiction under Section 60(b) of the Bankruptcy Act (11 U. S. C. A., Sec. 96(b)). This Court has jurisdiction under Section 1291 of the United States Code of Judiciary and Judicial Procedure (28 U. S. C. A., Sec. 1291). See also Section 24 of the Act Relating to Bankruptcy (11 U. S. C. A., Sec. 47).

Statement of the Case.

James T. Inman filed his voluntary petition in bankruptcy on October 17, 1953 [T. R. 17, 20]; that for several years prior thereto the bankrupt had engaged in his trade as a licensed plumber.

That along with plumbing work done for other persons, the bankrupt had done certain plumbing sub-contract work for one John H. Deeter, General Contractor [T. R. 68], and had purchased plumbing materials and supplies for such work from Keenan Pipe & Supply Company, dealer in plumbing materials and supplies [T. R. 20].

That during the time here in question the work done for Deeter by Inman fell into two categories:

1. Subcontract work on the California State Epileptic Hospital at Porterville, California [T. R. 21], original contract for \$11,300.00 and
2. Subcontract work on private residences [T. R. 78].

In addition to said sub-contract work on the California State Epileptic Hospital at Porterville, California, Inman had a separate contract with the State of California for "change orders" and "extra work" done by him as a licensed plumber on said California State Epileptic Hospital at Porterville, California, for which Inman filed a claim with the State of California for approximately \$12,000.00, which was reduced approximately \$2,000.00 before payment [T. R. 81].

During the course of the work on the State Porterville job and prior to the delivery of the materials and supplies by Keenan, and beyond the four month period, Inman had an oral understanding with Keenan and Deeter to the effect that Keenan would carry for Inman the cost of the materials and supplies and Deeter would carry the cost of the labor for said job until payment was received from the State of California upon completion of the job and that said sums would be payable therefrom [T. R. 81, 83].

That as of July 8, 1953 said State Porterville job had been completed but final payment therefor had not been made by the State of California, and there was due from Inman to Keenan \$13,306.08, of which amount the sum of \$5,416.63 was due for materials and supplies furnished to said State Porterville job, which latter sum was paid on July 8, 1953 by Deeter to Keenan by way of a joint check dated August 9, 1953 payable to Inman and Keenan, and which check was endorsed by Inman and his wife and then deposited to the account of Keenan. At the time of this payment to Keenan, Keenan was entitled to file "Stop Notices" in accordance with Section 1190.1 of the California Code of Civil Procedure [T. R. 72, 73, 79, 85].

That as of September 4, 1953, there was due from Inman to Keenan on account of plumbing materials and supplies \$7,928.90, of which amount the sum of \$769.01 was due for materials and supplies furnished for the construction of private residences being built by Deeter as general contractor [T. R. 78], which sum was on that date paid by the check of Deeter directly to Keenan. At the time of this payment said residences were subject to the lien of Keenan for such materials and supplies and the time within which Keenan could have filed claims of lien to cover same in accordance with Section 1193.1 of the California Code of Civil Procedure had not expired [T. R. 79].

That at the time of the payment of said \$5,416.63 and said \$769.01 said State Porterville job had been completed, but final payment therefor had not been made by the State of California [T. R. 84] and there was then due Inman the 10% withhold on his original contract, or \$1,000.00 [T. R. 81] plus the amount of his claim for "change orders", approximately \$10,000.00 net [T. R. 81]. That Deeter paid said \$5,416.63 and said \$769.01 to Keenan (1) to prevent Keenan from filing a "stop notice" on the State Porterville job and "claims of lien" on the private residences [T. R. 85], and (2) because he knew Inman would have enough out of the State Porterville job to reimburse him for these amounts.

That Inman's financial condition was substantially the same when each of the checks in question were paid to Keenan; that at such times he had assets variously valued by Inman and his wife from \$15,000.00 to \$30,000.00, among which were the following:

1. 10% retention on original subcontract on California Porterville job, \$1,000.00 [T. R. 81]

2. "Extra work" and "change orders" on the California Porterville job, original claimed approximately \$12,000.00 later reduced approximately \$2,000.00 \$10,000.00 [T. R. 81]
3. Personal residence, valued and listed for sale at \$15,000.00, subject to \$11,000.00 encumbrance \$4,000.00 [T. R. 47]
4. Three motor vehicles, 1940 International 1½ ton truck, 1949 Pick-up truck, 1947 Packard Sedan, valued at \$1,000.00 to \$1,200.00, subject to no liens \$1,200.00 [T. R. 55]
5. Stock in trade, valued at \$3,000.00 [T. R. 25]
6. Tools, valued at \$1,000.00 to \$1,500.00
7. Farming equipment, valued at \$1,000.00 to \$1,200.00 [T. R. 45], on which \$900.00 was owed
8. Due on other contracts, requiring \$3,200.00 additional plumbing materials to complete, recoverable amount to Inman not being established, value unknown [T. R. 33].

That at the time of said payments Inman's liabilities were approximately \$20,000.00, of which \$4,629.94 was for taxes.

That prior to the payment to Keenan of said two checks, Inman experienced difficulty "in getting his hands on money"; that Keenan's agent Keefe visited him regularly about once a week; that Keefe was friendly towards him; that Keefe asked him for payment on account and for a list of uncompleted jobs [T. R. 33]; that Inman and Keefe determined that it would take \$3,200.00 additional plumbing materials and supplies to complete the uncompleted jobs [T. R. 33]; that Keefe assisted Inman in the preparation of his claim for extras on the State Porterville job.

Specification of Errors.

I. That Finding No. 5 "That payment of said sum (\$6,185.64) resulted in a depletion of the estate of said James T. Inman" is not supported by the evidence. (Par-
enthetical material added.)

II. That Finding No. 6 "That at the time of the payment of each of the sums totaling \$6,185.64, the said James T. Inman was insolvent" is not supported by the evidence.

III. That Finding No. 7 "That at the time of said payment defendant had reasonable cause to believe that said James T. Inman was insolvent" is not supported by the evidence.

IV. That Finding No. 8 "That as a result of the payments aforesaid, defendant was enabled to obtain a greater percentage of his debt than some other creditor of the same class" is not supported by the evidence.

V. That Conclusion of Law No. 1 "The subject transfer of \$6,185.64 constitutes a voidable preference under Section 60 of the Act Relating to Bankruptcy" is not supported by the evidence or the Findings of Fact and is contrary to law.

VI. The Court in concluding that the payments to appellant were voidable preferences under Section 60 of the Act Relating to Bankruptcy held that payments to a holder of a materialman's lien during the existence of said lien were voidable preferences; and such holding

is contrary to the provisions of the laws of the State of California, of Section 67 of the Act Relating to Bankruptcy, and the court decisions applicable thereto.

Summary of Argument.

1. In a situation where in order to complete his contract a subcontractor arranges with his prime contractor and his materialman that the prime contractor would advance the money for labor costs and the materialman would supply the materials to complete the contract and that the prime contractor would be reimbursed for his advances, and the materialman paid, when funds were received from the public body; and where pursuant to such arrangement the materialman supplied the necessary materials and when the funds were received from public body the moneys due the materialman were paid to him by the prime contractor to extinguish the materialman's lien, such payment was not a voidable preference even though such payment was received within four months of bankruptcy.

2. The extinguishment of a materialman's lien by payment within four months of bankruptcy is not a voidable preference.

ARGUMENT.

I.

No Voidable Preference by Extinguishment of Lien.

In the case at bar the facts are not in serious dispute. The prime contractor, Deeter, had a contract with the State of California for the construction of certain facilities at the State Hospital for Epileptics at Porterville, California. The bankrupt, Inman, was the plumbing subcontractor on the job. Appellant, Keenan Pipe & Supply Company, sold and furnished plumbing materials and supplies to the bankrupt which materials and supplies were used in the construction of said facilities. After the main contract had been completed, the State of California issued some change orders for the bankrupt who undertook to perform the change orders. There were no progress payments on the change orders and it became necessary to make arrangements to carry the bankrupt. Keenan agreed to carry the material and Deeter agreed to carry the labor [T. R. 81]. After the work had been done and before the payment on the change orders had been received from the State of California, Deeter in order to prevent Keenan from filing a Stop Notice with the State of California issued on July 7, 1953 a postdated check payable jointly to the bankrupt and Keenan in the sum of \$5,416.63 [T. R. 73]. This check was dated August 9, 1953 and paid by the bank on August 11, 1953. Approximately three weeks later Deeter issued a check dated September 4, 1953 payable to Keenan alone in the sum of \$769.01 in order to prevent claims of lien from being recorded against private dwellings. These checks paid in part the bankrupt's obligation to Keenan. Keenan is still a general creditor of the bankrupt's as to the balance of the obligation due from the bankrupt.

These checks were received by Keenan in satisfaction of its liens for the materials furnished for and used by the bankrupt on the respective jobs.

As of the time of the payment of the aforesaid checks Keenan held liens upon the funds payable from the State of California and on the private dwellings. It had done all that was required of it by the laws of the State of California. If the liens had not been extinguished by the payment of the aforesaid sums, Keenan could have enforced its lien by filing what are commonly known in the profession as "Stop Notices" with the State of California and secured payment by such methods on the public improvement and by claims of lien recorded against the private dwellings.

The lien of Keenan is founded on Section 15, Article XX, of the Constitution of the State of California which provides as follows:

"Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished; and the legislature shall provide, by law, for the speedy and efficient enforcements of such liens."

It is to be noted that the Constitution establishes a lien and directs the Legislature to provide for the "speedy and efficient enforcement of such liens." In compliance with Constitutional directive the Legislature enacted appropriate legislation for the enforcements of said liens. Chapter II, Title IV of the Code of Civil Procedure of the State of California is the present enactment of the Mechanic's Lien Laws pursuant to said Constitutional directive.

Since Keenan had a lien for the plumbing materials and supplies furnished in the construction of the public work, to what property does Keenan's lien attach? Since the real property upon which the construction was done was public property, it is clear that the real property cannot become subject to the lien.

In the case of *Goldtree v. City of San Diego*, 8 Cal. App. 505, 97 Pac. 216, 8 Cal. App. 512, 97 Pac. 218, it was held that Section 1184 (now Sec. 1190.1) of the Code of Civil Procedure for giving notice of claim by notice to the holder of the fund earned by claimant's labor, and not that provided by Section 1183 (now Sec. 1193.1) of said code by recording against the property, applies where a lien is claimed for work done on a public improvement.

See also *Bates v. Santa Barbara County*, 90 Cal. 543, 27 Pac. 438.

In *Malott & Peterson v. Street* (9th Cir.), 4 F. 2d 770 (1920), the Court states:

"Again, it (the materialman) might, in a proper case, serve notice on the owner to withhold, and pursue the remedy prescribed by Section 1184 (now Section 1190.1), and by doing so it might acquire a lien which would not be affected by the subsequent bankruptcy of the debtor." (Matters in parenthesis added.)

As above noted, before starting on the change orders, an agreement was reached between Inman, Deeter and Keenan wherein Keenan agreed to supply the materials and Deeter to furnish the payroll to enable Inman to do the change order work, all parties agreeing that no payments would be forthcoming until such time as the

change order work had been accepted by the State of California.

This situation is somewhat similar to the facts of the case of *United States Fidelity and Guaranty Co. v. Sweeney*, 80 F. 2d 235 (1935). In this case the debtor was a contractor on a highway construction contract in Missouri. The United States Fidelity and Guaranty Company furnished the completion bond on the contract. The contract provided that the State Highway Commission was to withhold certain percentages of the amounts due on progress payments until the work of improvement was accepted by the commission. Prior to executing the surety bonds United States Fidelity and Guaranty Co. required the contractor to assign to it the above reserve withholds and deposits. After work was commenced, it became evident that the contractor would default in the payment of labor and material. An agreement was then set up whereby a special account was opened with the Central Missouri Trust Company in which account all moneys were to be deposited. The Highway Commission was notified and thereafter made all payments due on account of said contract into this special account. All accrued bills of the contractor were to be paid by check of the contractor drawn against this account and countersigned by United States Fidelity and Guaranty Co. This arrangement continued until the contractor was adjudicated a bankrupt. The money which was the basis for the action was the balance in said account as of the adjudication in bankruptcy, the contract having been completed and all moneys due from the Highway Commission had been paid. After bankruptcy, United States Fidelity and Guaranty Co. paid said funds out on labor and material bills. The trustee in bankruptcy

sought to recover the amount on hand as to the date of bankruptcy.

The court held that United States Fidelity and Guaranty Co. had an equitable lien on said deposits, saying:

“‘As long as the percentages held back to secure performance of the contract can be identified and followed, they can and should be subjected in equity to the lien of the security.’ ‘Equitable liens, if created before the four months period before bankruptcy, are valid and enforceable against the trustee, and they are not preferential even though the funds upon which they are a charge are collected after adjudication in bankruptcy. *Voltz v. Treadway & Marlatt*, 59 Fed (2d) 643. If an equitable lien is created, it is immaterial that the formal ascertainment of the specific beneficiaries was made within four months of the bankruptcy proceedings.’ (Citing *Johnson v. Root Mfg. Co.*, 241 U. S. 160.) ‘We conclude that appellant (United States Fidelity and Guaranty Co.) had a valid equitable lien upon these funds which should be recognized and protected; *that its rights had their inception at the time it became surety for the construction company.*’” (Emphasis added.)

For a similar situation, reference is made to the case of *McCluer v. Heim Overly Realty Co.*, 71 F. 2d 100 (1934). In this action trustee sought to recover sum received by defendant pursuant to assignment and pledge of amounts receivable from construction contract. Defendant loaned bankrupt sums to be deposited on bid on two sewer contract bids. Thereafter, defendant went surety on bankrupt's performance bonds, but before doing so first obtained from bankrupt an assignment of all funds derived from said construction projects. After the construction was completed, a dispute arose between the

officials of Kansas City and the bankrupt over the estimate of the balance due the bankrupt. Thereafter suit was commenced by the bankrupt against the city and bankrupt, after discovering the original assignment had been lost, made a new assignment of all moneys due under the estimate to defendant. Shortly thereafter bankruptcy proceedings were commenced. The Court held the assignments to be timely and valid and not preferential in nature, saying:

“Since the lien created by the pledge of February 10, 1927, was genuine and sufficient and created more than four months before filing of the bankruptcy petition, the endorsement of that lien by collection of the \$54,177.50, within the four months period did not operate as a voidable preference.”

In the case of *Stickney v. General Electric Co.*, 44 F. 2d 362, all parties agreed upon the segregation of money becoming due a contractor for the protection of one who was selling him property to go into the project. The contractor went into bankruptcy, but the Court held that the trustee was not entitled to a deposit made for the benefit of the seller of property which went into the project. In the instant case the parties agreed that in order to carry Inman, Deeter would meet the payroll and Keenan the materials and although the record is silent thereon it may be inferred that the parties further agreed that upon receipt of the moneys from the State of California Deeter would reimburse himself for the payroll which he had paid out which he did [T. R. 82] and that Deeter would pay Keenan on behalf of Inman for the materials supplied by Keenan. If such an inference cannot be made there would be no basis for Keenan continuing to furnish materials to Inman.

The case of *Johnson v. Root Mfg. Co.*, 241 U. S. 160, is authority for the principle that payment of lienable claims within four months of bankruptcy does not create a voidable preference.

See also 6 *American Jurisprudence, Bankruptcy*, Section 1085.

Thus, the courts have held payment of a debt secured by a lien, legal, statutory, equitable or inchoate, which lien attached prior to the preferential period could be paid within four months of bankruptcy without creating a voidable preference.

In the case of *Jackson v. Flohr*, 119 Fed. Supp. 305 (U. S. D. C. W. D. Wash.), the facts were: In this case payments were made to the materialmen by check made payable to the materialman and the contractor. The court said:

“By the express terms of Section 107, sub. (b) a mechanic’s lien can be completed and enforced after bankruptcy adjudication without effecting a preference. If so, it surely could not have been the legislative intent that an unlawful preference result from satisfaction of a fully valid inchoate lien through payment of the debt secured by the lien prior to adjudication.”

The court further stated:

“Plaintiff strenuously insists that the bankrupt’s estate was depleted by the payments in question. *If it be considered that the Bankruptcy Act by giving a lawful preference to the lien of a materialman, in effect earmarks funds in the hands of the owner for payment of the materialman, either by perfection and foreclosure of the lien or by discharge of the lien or by discharge of the lien through payment, no*

actual depletion occurs. (Emphasis added.) Congress certainly had the power to authorize preferences to materialmen and to make them dependent upon state law. There can be no doubt that Washington law extends a preference to materialmen and that the only condition thereof within the ninety day period is the giving of the five day notice. *Defendants in the instant case up to the time of receiving payment of their accounts had done everything required by state law to establish their status as lienors.* (Emphasis added.) Both letter and spirit of the Bankruptcy Act and the state lien law dictate that defendants should have the preference intended for materialmen.

“In the *San Mateo* case California transactions and California law applicable to materialmen’s liens were involved. Presumably neither *Seattle Association of Credit Men vs. Daniels, supra*, nor any other Washington decision was cited or considered. The opinion does not cite any California decisions as controlling and independent research indicates that there are none. Inasmuch as Washington authority inferentially if not directly in point is available, the *San Mateo* decision is not controlling. Moreover, from the recital at page 876 of the opinion concerning the contentions made in that case, neither question presented and decided was identical with the precise lien question for decision in the present case. The First contention in the *San Mateo* case that release of an inchoate lien resulting from payment constitutes a present consideration for the payment is not urged by defendants in this case, and the Second contention is inapplicable to the facts now under consideration.”

II.

Obligation Paid Was Not an Antecedent Debt.

It is the further contention of appellant that since appellant Keenan, Inman and Deeter in March 1953, entered into a parol agreement that in order to enable Inman to carry out the change order work, Deeter would carry the payroll and Keenan would furnish the materials and all parties agreeing that no payments could be made before the job was completed and accepted by the State of California, the payment of the obligation of \$5,416.63 to Keenan would not mature until the work had been accepted by the State of California and if this be true, then the payments to Keenan was not the payment of an antecedent debt as provided in Section 60(a) of the Act Relating to Bankruptcy.

III.

Finding of Insolvency Not Supported by the Evidence.

It is a further contention of appellant that the evidence does not support the finding that Inman was insolvent at the time Deeter made the payments here involved. The testimony of Inman and his wife is so uncertain, vague and indefinite that it cannot support any finding as to their financial condition as of the time of the payments to Keenan by Deeter.

Appellant also contends that the evidence does not support the Finding No. 6 that appellant had reason to believe that Inman was insolvent when the payments were received from Deeter. The testimony of both Mr. and Mrs. Inman indicate that although they were experiencing some difficulty, they believed that once they received payment on the change order work they would be able to straighten their affairs out.

Appellant has perfected this appeal with full cognizance of the opinion of this Court in the case of *San Mateo Feed & Fuel Co. v. Hayward*, 149 F. 2d 875. Appellant, however, contends that although said decision deals with a question similar to that in the instant case, the factual situation of the two cases are different in several important respects, as to the payments on the State of California property, which are:

1. The work of improvement in the present case was of a public nature and the lien attached to the funds payable from the State of California while in the San Mateo case the work was presumably on private property;

2. There was an agreement between contractor, subcontractor and materialman for the furnishing of payroll and materials for the job and reimbursement for the same in the instant case while the reported decision in the San Mateo case does not indicate any such agreement; and

3. There was no issue as to antecedent debt in the San Mateo case while in the instant case the question of antecedent debt must be determined. In view of the foregoing it is the contention of appellant that this court is not obliged to follow the San Mateo case on the theory of *stare decisis* or otherwise.

Appellant contends insofar as the extinguishment of the liens on the private dwellings by the payment by Deeter to Keenan of the sum of \$769.01, that this case is also dissimilar to the San Mateo case as it was a direct payment by Deeter to Keenan and was not by way of a check payable jointly to Keenan and Inman. It should be noted that Deeter was the general contractor on the private dwelling jobs as well as on the State of Cali-

for work. If any person depleted the bankrupt's estate it was the general contractor Deeter not Keenan. The reasoning of *Jackson v. Flohr, supra*, seems to be particularly pertinent as it pertains to the payment of the lien on the private dwellings herein involved.

To treat the problem in another light we have here a situation where the lien of the Keenan Pipe & Supply Co. attached the moment that building materials and supplies were delivered by Keenan for and went into the job. The record fully substantiates the position that all of the material furnished by Keenan to Inman went in the particular jobs. This being the case an actual and subsisting lien obtained for the reasonable value of those materials supplied to that job until the same were paid for. This being true this lien continued until (1) it could be extinguished, or (2) lost by failure on the part of Keenan to take steps to enforce the payment of the lien. Taking the first in order, extinguishment, it could be extinguished (1) by a waiver of Keenan of its rights by an instrument in writing, or (2) by payment of the amount due under the lien by either the general contractor, the owner, or the subcontractor. In this particular case it was paid by the general contractor prior to his receipt of the moneys due from the State of California. Under the California law it was not necessary to perfect a lien. The lien was in existence and fully enforceable at the time the payments were made by Deeter to Keenan. The only thing remaining to be done should Keenan be unpaid and desire to enforce its lien would be to either give a stop notice where required on public buildings, or by recording its claim of lien on private properties. These procedures, of course, do not establish a lien, they are merely acts of procedure in foreclosing the same.

The *San Mateo* case (*supra*) states that since the property subject to the lien was not the property of the bankrupt, therefore any payment of moneys to the lienor on the obligations of the bankrupt would be a voidable preference. This seems to overlook the fact that under state law and under Section 67 of the Act Relating to Bankruptcy lien claimants are put in a select position. The Act Relating to Bankruptcy provides, among other things, that even though a lien is created and is existing at the time of bankruptcy the lienor may go ahead with procedural steps to enforce payment of it. The *San Mateo* decision in effect says that the materialman cannot accept payment from the contractor or subcontractor and thereby extinguish existing liens without running the danger that within four months next succeeding the contractor, or subcontractor, may go bankrupt and a claim raised that the payment of the amounts due under a valid lien are voidable preferences. This seems to be entirely at variance with the Act Relating to Bankruptcy and the State lien laws. Under the present decision of the *San Mateo* case, in order to protect themselves materialmen or subcontractors, as the case may be, dare not accept payment of a valid lien in this state without running the danger above mentioned, but, on the other hand, must first, regardless of the inconvenience to the industry, or to the credit of the owner or contractor, file a claim of lien or a stop notice and thereafter obtain his payment from the owner or the public body, as the case may be. Practically, the ruling in the *San Mateo* case has worked a very definite burden on the construction industry, on the financing of many projects, and it is urged that the ruling of the *San Mateo* case should be expressly overruled by the decision of this Court.

Appellant respectfully submits that the judgment appealed from is erroneous and should be reversed with directions to enter judgment in favor of appellant with costs.

Respectfully submitted,

JOHN B. PETERMANN,

Attorney for Appellant.

MARK WATTERSON,

Of Counsel.

No. 14,913

IN THE

United States Court of Appeals
For the Ninth Circuit

| | | |
|---|---|-------------------|
| KEENAN PIPE & SUPPLY COMPANY, a corporation, | } | <i>Appellant,</i> |
| vs. | | |
| B. E. SHIELDS, as Trustee in Bank- ruptcy of James T. Inman, | | |
| | | <i>Appellee.</i> |

APPELLEE'S BRIEF.

DI GIORGIO & DAVIS,
1021 Chester Avenue, Bakersfield, California,
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FILED

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PAUL P. O'BRIEN, CLERK

Subject Index

| | Page |
|---|------|
| Statement as to jurisdiction | 1 |
| Statement of the case..... | 1 |
| Argument | 3 |
| I. Introduction | 3 |
| II. Was there a diminution of the estate? | 4 |
| A. A statutory lien? | 5 |
| B. An equitable lien? | 6 |
| III. Is appellant saved by the provisions of Section 67-b?.. | 9 |
| A. Careful analysis of the actual language of Sections 60 and 67-b will establish that Section 67-b is lim- ited to the liens arising on property of the bankrupt | 11 |
| B. Statutory liens on property other than the bankrupt's are already "valid against the trustee" without any aid from Section 67 | 12 |
| IV. Other exceptions urged by appellant | 13 |
| A. Antecedency of debt | 13 |
| B. Actual insolvency at time of payment | 13 |
| Conclusion | 14 |

Table of Authorities Cited

| Cases | Pages |
|--|--------------|
| Jackson v. Flohr, 119 Fed. Supp. 305 | 10 |
| Kruse v. Wilson, 3 Cal. App. 91 | 5 |
| Malott and Peterson v. Street, 4 Fed. 2d 770 | 5 |
| Manchester National Bank v. Roche, 186 Fed. 2d 817 (1951) | 9 |
| McClure v. Heim Overly Realty Co., 71 Fed. 2d 100 (1934) | 6 |
| San Mateo Feed and Fuel Co. v. Hayward, 149 Fed. 2d 875 | 4, 12, 14 |
| Stickney v. General Electric Co., 44 Fed. 2d 362..... | 6 |
| U. S. Fidelity and Guaranty Co. v. Sweeney, 80 Fed. 2d 235 (1935) | 6 |

Statutes

| | |
|---|-----------------|
| Bankruptcy Act: | |
| Section 60 | 4, 6, 9, 11, 12 |
| Section 67-b | 4, 9, 11 |
| California Civil Code, Section 3019 | 8 |

Texts

| | |
|---------------------------------------|---|
| 6 Am. Jur., Bankruptcy, 1085 | 6 |
| 3 Collier on Bankruptcy (14th Ed.): | |
| Page 832 | 4 |
| Sections 60.37, 60.38 and 60.50 | 7 |
| Section 60-a-6 | 7 |

No. 14,913

IN THE

**United States Court of Appeals
For the Ninth Circuit**

KEENAN PIPE & SUPPLY COMPANY,
a corporation,

Appellant,

vs.

B. E. SHIELDS, as Trustee in Bank-
ruptcy of James T. Inman,

Appellee.

APPELLEE'S BRIEF.

STATEMENT AS TO JURISDICTION.

Appellee adopts in its entirety the statement of appellant as to jurisdiction.

STATEMENT OF THE CASE.

The voluntary petition in bankruptcy of James T. Inman was filed on October 17, 1953. Appellee B. E. Shields subsequently was duly appointed trustee.

During the times pertinent to this controversy Inman was active as a plumbing subcontractor. During the same period, one John H. Deeter, a general con-

tractor, contracted with Inman for the performance of certain plumbing work. This work consisted of subcontract work on private residences and on a certain public construction job designated as the "California State Epileptic Hospital" at Porterville, California.

On July 8, 1953, final payment for the Porterville Hospital project had not yet been received by general contractor Deeter. (Tr. p. 84.) At this juncture there was due to Inman from the general contractor Deeter on account of the Porterville Hospital job the sum of \$5,416.63. (Tr. p. 84.) On July 8, 1953, Deeter executed and delivered a check for that sum jointly payable to Inman and appellant, Keenan Pipe Company, pursuant to a prior agreement between the parties that Inman's materialmen would be paid by means of check jointly payable to Inman and the materialmen.

On September 4, 1953, there was due from Inman to appellant on account of plumbing materials and supplies used in the construction of private residences being built by Deeter as general contractor the sum of \$769.01. On that date Deeter paid over the same amount by a check payable to appellant.

At the time of these payments Inman owed Federal and State taxes in the amount of \$4,539.94, an account payable to appellant Keenan Pipe Company of \$13,306.08, \$500.00 to the Anglo Bank, \$600.00 to Bank of America, back rent of \$700.00, \$1500.00 to a firm known as Tay-Holbrook, \$2,650.00 to a firm known as Bernstein Plumbing, a total of \$23,796.02. In

assets Inman had an equity in his home which practical experience proved was worthless, despite the fact that, in his personal estimation, the home should have brought \$3,000.00 more than was due on it. He had stock-in-trade valued at \$1200.00 at most, and an account receivable on the Porterville job of \$5,416.63, and accounts receivable for miscellaneous private jobs of \$769.01, or a total of \$14,885.64 allowing the maximum on the equity in home, tools, and autos. (Tr. pp. 23-30, 35-40, 54-55, 59.)

Prior to the payment to appellant of the two amounts in issue, Inman and his wife repeatedly advised Mr. Keith, agent of the appellant, of their financial difficulties, of their inability to pay their bills as they came due, and of their contemplation of bankruptcy. (Tr. pp. 31-34, 56-59.)

As the result of the two payments, appellants received a greater percentage of the amounts due them than will the creditors of the bankrupt who must rely on the assets of the estate, since a dividend of far less than one hundred per cent will be paid. (Tr. p. 93.)

ARGUMENT.

I. INTRODUCTION.

The essential question here presented is whether mechanics or materialmen who forego the exercise of lien or stop notice rights arising from a construction project in favor of accepting payment from their

subcontractor have special grounds for avoiding the preferential transfer statute when the bankruptcy of the subcontractor later occurs.

In addition to answering this broad question in the affirmative, appellant finds comfort of a cumulative nature in the special facts of the present controversy. We will deal with these as we proceed.

It would appear useful to orient the discussion which follows in terms of these two issues of law:

(a) Was there no such a depletion of the estate of the bankrupt as is required by Section 60 of the Bankruptcy Act?

(b) Even if otherwise there was such a depletion, does Section 67-b of the Act extend special protection to transferees in the category of appellant?

Appellant asks that this Court reverse the position taken by it in *San Mateo Feed and Fuel Co. v. Hayward*, 149 Fed. 2d 875, and answer both questions in the affirmative. We propose to establish that the rule in the *San Mateo Feed* case should stand.

II. WAS THERE A DIMINUTION OF THE ESTATE?

It is too well established to require detailed citation that in addition to the explicit requirements of Section 60, the challenged transfer must have caused an actual depletion of the estate. (3 *Collier on Bankruptcy* 14th Ed. 832.) Thus if a debtor were to satisfy a mechanic's lien against his own home, the increase in the value of the property would offset the loss of

money and no preference would occur. The question, then, is whether this appellant materialman had a lien on any asset of the bankrupt.

A. A Statutory Lien?

The assets of the bankrupt conceivably subject to lien are the accounts receivable owed by general contractor Deeter to the bankrupt, being money due for plumbing work on a public project, and a collection of small amounts due for work done on private residences. Did appellant have a lien on these accounts receivable?

The lien arising out of the public project was in the form of a stop notice which could have been filed with the State of California against moneys due general contractor Deeter from the State. *It has been expressly held in California that a materialman who furnishes materials to a subcontractor in a building cannot, by means of stop notice, intercept the moneys which may be due from the contractor to the subcontractor.* (*Kruse v. Wilson*, 3 Cal. App. 91.) This Honorable Court adopted the *Kruse* case as a correct statement of California law in *Malott and Peterson v. Street*, 4 Fed. 2d 770.

In the case of the payment for work done on private residences, it is even plainer that no asset of the bankrupt was subject to the lien rights of appellant. The mechanic's liens, of course, would be encumbrances on the residences themselves.

B. An Equitable Lien?

Appellant finds in the Transcript evidence of an agreement between the contractor, the debtor, and appellant that the money to be paid appellant would be paid specifically from the money paid by the State. Pages 81 and 83 are cited in this connection. We do not perceive the agreement with the same clarity, and we note that in actual fact the contractor Deeter paid appellant on account of the debtor before the money from the State was even received. (Tr. p. 84.) But ignoring that, and assuming the contract to have been exactly as appellant contends, we cannot find aid for appellant in the present state of the law.

The theory apparently relied on is that the agreement between the parties, made outside the four months period, perfected the transfer to appellant by virtue of the equitable lien arising therefrom. At an earlier time in the history of the Bankruptcy Act this theory would have had considerable merit in the instant circumstances. But appellant, in citing such cases as *U. S. Fidelity and Guaranty Co. v. Sweeney*, 80 Fed. 2d 235 (1935), *McClure v. Heim Overly Realty Co.*, 71 Fed. 2d 100 (1934), *Stickney v. General Electric Co.*, 44 Fed. 2d 362, and such text material as is contained in 6 Am. Jur., Bankruptcy 1085, apparently completely disregards the fundamental changes wrought by Congress in Section 60 in 1938 and 1950.

The length of this brief would be doubled with little gain if the historical development of the sec-

tion as it bears on equitable liens were here traced in detail. Suffice it to say that the subject is exhaustively treated in Sections 60.37, 60.38, and 60.50 of Collier on Bankruptcy, 14th Edition. (Vol. 3.)

At the end of Section 60.50 the Editors conclude:

“It is believed that equitable liens, equitable assignments, and the like are largely eliminated in bankruptcy by the various provisions of the present act.”

Let us test this broad conclusion by applying to the instant facts the provisions of Section 60-a-6, the text of which follows:

The recognition of equitable liens *where available means of perfecting legal liens have not been employed* is hereby declared to be contrary to the policy of this section. If a transfer is for security and if (A) applicable law requires a signed and delivered writing, or a delivery of possession, *or a filing or recording, or other like overt action* as a condition to its full validity against third persons other than a buyer in the ordinary course of trade claiming through or under the transferor and (B) such overt action has not been taken, and (C) such transfer results in the acquisition of only an equitable lien, then such transfer is not perfected within the meaning of paragraph (2). Notwithstanding the first sentence of paragraph (2), it shall not suffice to perfect a transfer which creates an equitable lien such as is described in the first sentence of paragraph (6), that it is made for a valuable consideration and that both parties intend to perfect it and that they take action

sufficient to effect a transfer as against liens by legal or equitable proceedings on a simple contract: Provided, however, That where the debtor's own interest is only equitable, he can perfect a transfer thereof by any means appropriate fully to transfer an interest of that character: And provided further, That nothing in paragraph (6) shall be construed to be contrary to the provisions of paragraph (7). (Emphasis ours.)

The agreement found by appellant in the transcript provides, at most, that appellant would "carry" the debtor until payment was made by the State and then appellant would be paid from those funds. If this agreement gives rise to an equitable lien, were the "available means of perfecting legal liens . . . employed"? And specifically, was the "overt action (required) as a condition to its full validity against third persons . . ." ever taken as required in the section just quoted?

The "overt action" thus necessary in the case of accounts receivable is:

(a) Execution of an express legal assignment as opposed to an equitable assignment arising out of a contract.

(b) Compliance with the several provisions of Section 3019 of the California Civil Code, relating to the filing of the requisite notice in the office of the filing officer.

The record contains no suggestion whatever that the above steps were taken. It would therefore seem

manifest that whatever equitable lien may have existed in favor of appellant, it totally failed to meet the present requirements of Section 60. Closely in point is *Manchester National Bank v. Roche*, 186 Fed. 2d 817, (1951).

III. IS APPELLANT SAVED BY THE PROVISIONS OF SECTION 67-b?

Section 67-b reads in part as follows:

“The provisions of Section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition initiating a proceeding under this Act by or against him.”

The contention of appellant is that, by virtue of this language, a transfer, otherwise voidable under Section 60, is saved if it is given in satisfaction of a mechanic's lien on a construction project on which the debtor has expended labor and materials, since in such a case funds in the hands of the owner are “earmarked” for the materialman, and the extinguishment of the lien thus causes no true depletion of the estate. This is the position taken by a Washing-

ton District Court in this circuit in *Jackson v. Flohr*, 119 Fed. Supp. 305.

We note only in passing that the Court was dealing with Washington rather than California law and instead contend that the holding is inherently unsound. It is respectfully urged that the Court fell into error by ignoring fundamentals.

The transferred asset of the subcontractor debtor is the account receivable owed to him by his general contractor. It is still owed to him even if the owner never pays a cent to the general contractor. If he transfers the receivable to satisfy the claim of a materialman, it is obvious that he has depleted his estate, regardless of the separate security right to recover from the owner which was relinquished by the materialman.

But we do not dismiss the position taken in the *Jackson* case merely by pointing out its most obvious weaknesses. It can also be argued that Congress intended mechanics and materialmen to be protected from preference actions when a statutory lien right otherwise available to them is extinguished by the payment, *regardless of whether the lien was or was not on property of the bankrupt and hence regardless of whether or not a depletion of the bankrupt's estate resulted*. No discussion of the problem would be complete without consideration of this contention.

A. Careful Analysis of the Actual Language of Sections 60 and 67-b Will Establish That Section 67-b Is Limited to the Liens Arising on Property of the Bankrupt.

It is provided in Section 67-b that "The provisions of Section 60 of this Act to the contrary notwithstanding, statutory liens . . . may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition . . ."

And, what does Section 60, the section thus inhibited, *concern itself with?* It is the *preference* section, and it begins, "A preference is a transfer, as defined in this Act, of any of *the property of a debtor* to or for the benefit of a creditor." Section 67-b, then, is a limitation on *transfers by the debtor of his own property*, prior to bankruptcy, which can be voided by the trustee. This is the concern of "the provisions of Section 60 of this Act", which could conceivably be "to the contrary notwithstanding."

Now, the creation *by the bankrupt* of encumbrances against his property is one of the very common means of "transferring" his property. If no other limitation existed, the creation of a *statutory encumbrance* could thus constitute a voidable preference. And it is altogether logical and consistent that a limitation on such otherwise voidable transfers should have been incorporated *to protect those who may have expended labor, materials, and the like on property of the bankrupt from being classed as preferential transferees*. Considered thus the two sections dovetail together, and Section 67-b is revealed as a logical limitation on Section 60.

B. Statutory Liens on Property Other Than the Bankrupt's Are Already "Valid Against the Trustee" Without Any Aid From Section 67.

In a sense this is the converse of the analysis just completed. A trustee in bankruptcy is no more able than anyone else to attack a duly perfected statutory lien on the property of *some person other than the debtor*; it is "valid" against him because Section 60 in no way declares them *invalid* against him. Or to put it differently, there is nothing in Section 60 "to the contrary notwithstanding."

In the instant case, the mechanic's lien and stop notice rights of appellant were valid against the trustee; nothing in the decision of the trial Court, or in the *San Mateo Feed* case there relied on, holds or implies that this appellee trustee had any right whatever to invalidate the stop notice or conventional mechanic's lien rights of appellant.

What the decision does hold is that if satisfaction is accepted by the materialman from his subcontractor obligor, *in lieu of enforcing the security*, it is done with the hazard that the transfer may be avoided in the event of the bankruptcy of that obligor.

It is difficult to see that the complained-of hardship to the construction industry as a result of this rule is any greater than that suffered by a businessman in any other category who accepts payment from one whom he has reasonable cause to believe is insolvent. Indeed the materialman, clad with lien rights, has a sure and safe alternative, while his counterpart in other branches of commerce generally has none.

IV. OTHER EXCEPTIONS URGED BY APPELLANT.

Appellant deemed it advisable to discuss only two of the other exceptions made in its opening brief. We will confine ourselves to these two and will seek to achieve the same brevity.

A. Antecedency of Debt.

Again assuming the existence of the contract found by appellant in pages 81 and 83 of the Transcript, it is difficult to see where its cause is aided. The agreed-upon time for payment of a debt is not the criterion for determining antecedency. Rather the question is whether the transfer was made for a present or past consideration. Manifestly the consideration given by appellant, the materials supplied, had long since been received when the payments here involved were made.

B. Actual Insolvency at Time of Payment.

According to the figures set out in the Statement of the Case, *supra*, the bankrupt was indebted in the amount of \$23,796.02 and had assets of \$14,885.64, even assuming appellant's view as to the value of the equity in the home, the higher value of the tools, and so on. It is plain that there was abundant evidence to support a finding of insolvency against any challenge of that finding on appeal.

CONCLUSION.

It is probable that we have said essentially little more here than was said by this Court in the *San Mateo Feed* case. It was there clearly perceived that Congress intended no such special advantage as is contended for here, but rather that the protection sought to be extended lien claimants was limited to those cases where labor, materials, and the like had been expended on property of the bankrupt himself. The Court's position was sound and should be reaffirmed.

Dated, Bakersfield, California,

March 2, 1956.

Respectfully submitted,

DI GIORGIO & DAVIS,

By THOMAS R. DAVIS,

Attorneys for Appellee.

No. 14913.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KEENAN PIPE & SUPPLY COMPANY, a corporation,
Appellant,

vs.

W. E. SHIELDS, as Trustee in Bankruptcy of James T.
Inman,
Appellee.

APPELLANT'S REPLY BRIEF.

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| CASES | PAGE |
|--|---------|
| Cutler Hammer, Inc. v. Wayne, 101 F. 2d 823..... | 2 |
| Jackson v. Flohr, 119 Fed. Supp. 305..... | 1, 2, 3 |
| Kruse v. Wilson, 3 Cal. App. 91..... | 3 |
| Perry v. Wood, Clerk of Court, 63 F. 2d 257..... | 2 |

| STATUTES | |
|---|---|
| Bankruptcy Act, Sec. 60..... | 1 |
| Bankruptcy Act, Sec. 67..... | 1 |
| Code of Civil Procedure, Sec. 1191.1..... | 3 |

No. 14913.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KEENAN PIPE & SUPPLY COMPANY, a corporation,

Appellant,

vs.

B. E. SHIELDS, as Trustee in Bankruptcy of James T.
Inman,

Appellee.

APPELLANT'S REPLY BRIEF.

In his brief appellee contends that all transfers within the four month period prior to bankruptcy (if the other elements are present) are voidable unless:

(1) There is a valid lien held by the transferee and that this lien must be on the property of the bankrupt; or

(2) That the transferee held a recognizable equitable lien against the property of the bankrupt.

In support of his contentions, appellee asks this Court to construe the provisions of Sections 60 and 67 of the Bankruptcy Act, and conclude that the only property to which the liens referred to in said Section 67 could attach are the properties of the bankrupt. On this issue appellant contends that the liens referred to in said Section 67 are not so limited but also extend to liens on properties other than those of the bankrupt. This is the holding of the case of *Jackson v. Flohr*, 119 Fed. Supp. 305

(decided after the effective date of the 1938 and 1950 changes in the Bankruptcy Act) in which the Court stated, *inter alia*:

“Plaintiff would limit the mechanic’s lien preference, made by reference in the Bankruptcy Act, to liens attaching to the property of the bankrupt. The Washington lien statute is not so limited and certainly Section 107, sub. b, of the Act, expresses no such limitation. To read such restriction into either the lien statute or Bankruptcy Act does violence to the spirit and language of both and vitiates the expressly granted preference to those entitled to lien status in a very substantial number of instances of great practical and commercial importance.

“By the express terms of Section 107, sub. b, a mechanic’s lien can be completed and enforced after bankruptcy adjudication without effecting an unlawful preference. If so, it surely could not have been the legislative intent that an unlawful preference result from satisfaction of a fully valid inchoate lien through payment of the debt secured by the lien prior to adjudication.”

See also:

Cutler Hammer, Inc. v. Wayne, 101 F. 2d 823;

Perry v. Wood, Clerk of Court, 63 F. 2d 257.

Appellee recognizes that the *Jackson* case supports appellant’s contentions but attempts to distinguish it by saying that the lien laws of Washington and California are different. As we read the cases the principal differences are that in Washington the materialman must, within five days of starting to deliver materials, give the owner written notice that he the materialman is so delivering materials and must record his claim of

lien within ninety days after his last delivery, while, on the other hand, in California no such notice to the owner is required and the materialman must record his claim of lien or file his stop notice within thirty days after recordation of Notice of Completion or within the prescribed period after cessation of labor. In both the *Jackson* and the present case the materialman had taken all steps required to be taken by law up to the date of payment. The Court held, in the *Jackson* case, that where such liens existed, payment and extinguishment of the lien within the four month period did not effect a preference. Appellee further attacks this case as being unsound but fails to point out wherein the decision is unsound.

It is appellant's contention that it held valid liens against the funds earmarked for the state project and on the properties on which the private residences were constructed; not on the bankrupt's alleged account receivable as contended by appellee.

Appellee cites the case of *Kruse v. Wilson*, 3 Cal. App. 91, to the effect that a materialman, by filing a stop notice with the contractor, cannot intercept money due from the contractor to the sub-contractor. Appellant takes no exception to this principle but it is suffice to note that appellant's stop notice rights (conceded by appellee) were against the funds in the hands of the public body pursuant to Section 1191.1 of the California Code of Civil Procedure not on any funds due from the contractor to the debtor.

Appellee as above noted treats the situation as one in which the bankrupt has transferred to appellant an account receivable; however, appellant contends that there was no transfer of a receivable by the debtor *but the extinguishment of valid liens by the general contractor.*

For the purpose of argument, let us assume that appellant filed its Stop Notice with the State of California and recorded its materialman's lien. If enforcement of such liens was effected by suit or otherwise, the monies due appellant therefrom would have been paid to appellant by the State or by the owner *and would never have become an asset of the debtor's estate nor would such payment have caused a depletion of his assets.* Can it then logically be said that payment by the general contractor, when faced with imminent prospect of Stop Notices being filed, of monies due a materialman holding valid liens, caused a depletion of the bankrupt's estate?

There is no conflict between the parties that Deeter paid out the monies to appellant in pursuance of their prior agreement, Deeter having stated that he had reimbursed himself for the amounts which he had advanced to meet the bankrupt's labor payrolls and that he felt that there was still sufficient money yet coming from the State of California to reimburse himself for the monies paid to appellant to satisfy its materialman's lien. Appellee concedes that the payment by Deeter to Keenan of the first check antedated the receipt of the balance of the money from the State of California. Thus the payment from Deeter to appellant must have been as testified by Deeter for Deeter's own account to extinguish the appellant's liens. There was ample consideration passing from appellant to Deeter for the said payment by Deeter. If Deeter, from monies normally due the bankrupt, subsequently reimbursed himself for the payment to appellant, should not the trustee look to Deeter to recover the preference, if any, that resulted from Deeter's action?

It should be noted that the monies here sought to be recovered from appellant were funds paid out by the gen-

eral contractor Deeter. The reason for making the larger of the two checks payable jointly to the bankrupt and to appellant was to obtain from the bankrupt an acquittal as to the amount of the payment and to prevent the bankrupt from seeking a double recovery from Deeter. The payment by Deeter was intended for appellant to extinguish its lien rights and was not the payment to the bankrupt of his account receivable.

Appellee apparently contends that if appellant had filed a stop notice and recorded claims of lien and thereafter received payment, no preference would result. Appellee finds fruition of the lien by filing stop notice or recording claim of lien. It is submitted that the liens existed and the filing of the stop notice or recording of claims of lien are only steps of enforcement of the existing liens and hence such filing or recording add nothing to the lien itself.

Conclusion.

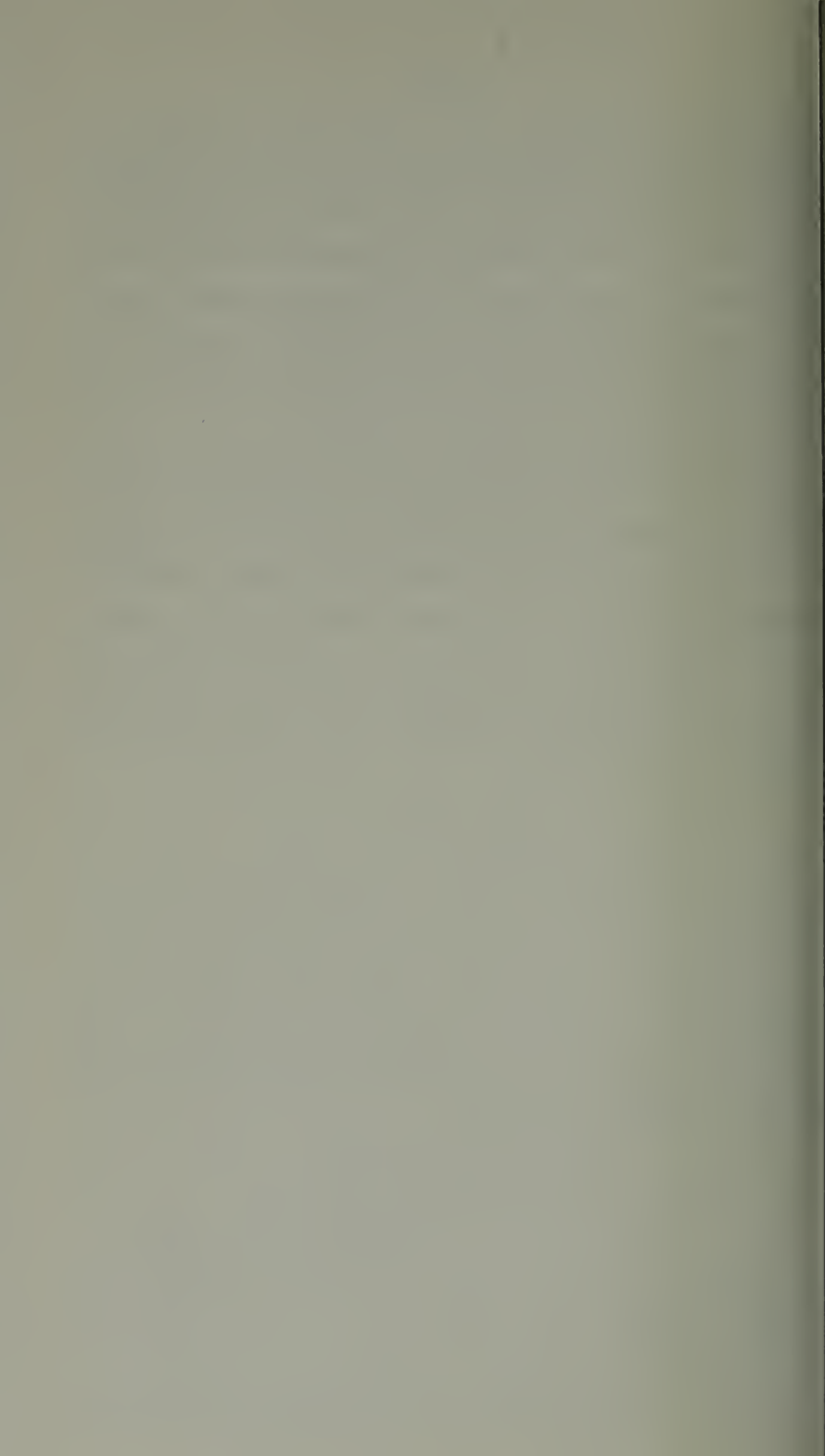
Appellant respectfully urges that this Court determine that no preference results from the extinguishment of a materialman's lien by payment from the general contractor within the four month period prior to bankruptcy, and that the judgment appealed from is erroneous and should be reversed with direction to enter judgment in favor of appellant with costs.

Respectfully submitted,

JOHN B. PETERMANN,

Attorney for Appellant.

MARK WATTERSON,
Of Counsel.



No. 14913

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KEENAN PIPE & SUPPLY COMPANY, a corporation,
Appellant,

vs.

B. E. SHIELDS, as Trustee in Bankruptcy of JAMES T.
INMAN,

Appellee.

Brief of Amicus Curiae in Support of Position of Appellant Keenan Pipe & Supply Company, Filed by Glen Behymer at the Request of Building Material Dealers Credit Association.

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TOPICAL INDEX

| | PAGE |
|--------------------------|------|
| Foreword | 1 |
| Questions involved | 5 |
| Argument and law..... | 7 |
| Point I | 7 |
| Point II | 9 |
| Point III | 10 |
| Point IV | 11 |
| Point V | 12 |
| Point VI | 12 |
| Point VII | 14 |
| Point VIII | 16 |
| Point IX | 18 |

TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|---|------------|
| American Bowling Co. v. Central Tr. Co., 240 Fed. 401..... | 13 |
| Associated Oil Co. v. Commory-Peterson Co., 32 Cal. App. 582.. | 18 |
| Bates v. Santa Barbara, 90 Cal. 543..... | 20 |
| Burr v. Commonwealth, 212 Mass. 534, 99 N. W. 323..... | 11 |
| Burr v. Mass. School for Feeble Minded, 197 Mass. 357, 83 N. E. 883..... | 11 |
| Butler v. Ng Chung, 160 Cal. 438..... | 20 |
| Caswell Construction Co., In re, 13 F. 2d 667..... | 11, 13 |
| Chicasan Hotel Co. v. Barker Const. Co., 135 Tenn. 305, 186 S. W. 115 L. R. A. 1916F 106, 31 A. B. R. 916..... | 15 |
| Cooley v. Freeman, 204 Cal. 59..... | 18 |
| Cramond, In re, 145 Fed. 966, 17 A. B. R. 22..... | 12, 15 |
| Dwelle-Kayser Co. v. Noon, 140 Wisc. 475, 250 N. Y. Supp. 714 | 13 |
| Eberle v. Drennan, 40 Okla. 59, 139 Pac. 162, 51 L. R. A. (N. S.) 68..... | 15 |
| Emslie, Roy, In re, 102 Fed. 291, 4 Am. Bankr. Rep. 147..... | 11, 12, 13 |
| English v. Olympic Auditorium Co., 217 Cal. 631..... | 9 |
| Fehling v. Goings, 87 N. J. Ed. 375, 58 Atl. 642, 12 A. B. R. 154 | 13 |
| Frater's Glass & Paint Co. v. Western Construction Co., 200 Cal. 688 | 18 |
| General Electric Co. v. American Bonding Co., 180 Cal. 675..... | 18 |
| Geo. Lowe & Co. v. Leary, 49 Utah 506, 164 Pac. 1052, 32 A. B. R. 774..... | 13 |
| Harvard v. Jurian, 35 Cal. App. 757..... | 18 |
| Henderson v. Mayer, 225 U. S. 631, 56 L. Ed. 1233..... | 10 |
| Holden v. Mensinger, 175 Cal. 300..... | 18 |
| Jackson v. Flohr, 119 Fed. Supp. 305..... | 22 |

| | |
|---|--------|
| Jones v. Great Southern Fireproof Hotel Co., 86 Fed. 370, 30 C. C. A. 108..... | 9 |
| Moreau Lumber Co. v. Johnson, 29 N. Dak. 113, 150 N. W. 563, L. R. A. 1915(f), 1132..... | 10 |
| Mortgage Securities Co. v. Pfaffman, 177 Cal. 109..... | 9 |
| National Fireproofing Co. v. Daley, 76 N. J. Eq. 35, 74 Atl. 152 | 11, 13 |
| New York-Brooklyn Fuel Corporation, In re, 11 F. 2d 802.... | 10, 13 |
| Pneucrete Corp. v. U. S. F. & G., 7 Cal. App. 2d 733..... | 18 |
| Provident Institution for Savings v. Mayor of Jersey City, 113 U. S. 506, 28 L. Ed. 1102..... | 9 |
| Purington v. Olsten, 45 Cal. App. 621..... | 18 |
| San Mateo Feed and Fuel Co. v. Hayward, 149 F. 2d 875..... | 22 |
| Sudden Lbr. Co. v. Singer, 103 Cal. App. 386..... | 18 |
| Suisum Lbr. Co. v. Fairfield School District, 19 Cal. App. 595.. | 20 |
| Sunset Lbr. Co. v. Smith, 91 Cal. App. 746..... | 18 |
| Tube City Mining and Milling Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203, L. R. A. 1916(e), 303..... | 10 |
| Vanderlip v. Walker, 144 Misc. 629, 259 N. Y. Supp. 289, 21 Am. Bankr. Rep. (N. S.) 638..... | 11, 13 |
| Weston, Ray, In re, 69 F. 2d 913, 98 A. L. R. 319..... | 11 |

STATUTES

| | |
|----------------------------------|--------|
| Bankruptcy Act, Sec. 60..... | 24 |
| Bankruptcy Act, Sec. 67(b) | 23, 24 |
| Civil Code, Sec. 2897..... | 10 |

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Brief of Amicus Curiae in Support of Position of Appellant Keenan Pipe & Supply Company, Filed by Glen Behymer at the Request of Building Material Dealers Credit Association.

Foreword.

The statement of the case and of the facts has been rather fully presented by counsel for Appellant. In this Brief of *Amicus Curiae*, therefore, the writer will confine himself primarily to the legal points involved, discussing the facts only to the extent deemed necessary with respect to the proper consideration of the law applicable thereto.

We have, in the case at bar, a situation where the proof adduced and the stipulations made at the trial establish definitely the following facts:

1. One Deeter, as prime contractor, and the bankrupt, as a plumbing subcontractor, were engaged in the

construction of extra work on a State of California Public Works job, the California Epileptic Hospital at Porterville, California.

2. This subcontractor who was engaged to perform, as an independent contractor, the plumbing work on the job in question, purchased from the appellant materialman, Keenan Pipe & Supply Company, plumbing materials for use in and which were used in the performance of the said subcontract and, therefore, in the performance of the prime contract.

3. While the right still existed, permitting the materialman to, for its protection, follow one or both of the following courses:

- (a) File a Stop Notice or Notice to Withhold with the public body letting the contract; or
- (b) File an action against the prime contractor and his surety on the mandatory Public Works Bond which had been furnished in compliance with the California statutes;

the prime contractor, desiring to prevent reflection on his credit and, presumably, to avoid paying counsel fees to the materialman in the event suit was brought on either the Stop Notice or on the Bond, or both, agreed directly with the materialman that if the latter would not file such Stop Notice or Verified Notice to Withhold, he, the prime contractor, would pay direct to the materialman the sum of \$5,416.63, the amount of the materialman's bill, for the materials furnished for use in and used in the performance of said work.

4. The materialman kept its agreement and refrained from filing either Stop Notice and suit thereon or suit on the Public Works Bond.

5. The prime contractor kept his agreement to pay the amount owing to the materialman, and, in order to have a check as additional evidence showing that he was also discharging, *pro tanto*, his indebtedness to the subcontractor arising out of the aforesaid job, made the check payable to both the materialman and the subcontractor. The subcontractor, pursuant to an antecedent agreement so to do, endorsed the check and delivered it to the materialman, who deposited same in the materialman's bank account.

6. Before the materialman agreed to furnish, and did furnish, these materials for use in said job and more than four months prior to the bankruptcy of the aforesaid subcontractor, the materialman extended credit to the subcontractor upon the understanding that the prime contractor would pay the labor payroll of the subcontractor for the labor performed in this extra work, and upon the further understanding that the materialman would be paid for the materials furnished by the said materialman upon completion of the job and out of the job funds.

The foregoing is the statement of the essential facts with respect to the public works job involved in this action.

The facts stipulated and proved before the trial court establish a very similar situation with respect to the pri-

vate job involved in this action and with respect to materials furnished by the same materialman to the same subcontractor on a private job on which the same prime contractor acted as prime contractor. The following are the only differences:

(a) The amount involved and paid to the materialman, being also the amount of the debt owing by the subcontractor to the materialman for materials furnished for use in and used on said job, was \$769.00.

(b) The materialman, at the time of payment of said sum, had, instead of a right to file a Stop Notice or sue on the prime contractor's Bond, an inchoate right to record a claim of Mechanic's Lien against the property upon which the materials had been furnished and used.

(c) Within the period during which the right to record a Claim of Lien for the purpose of perfecting the lien existed, the check for \$769.00 was given directly by the prime contractor to the materialman, without the signature of the subcontractor being added thereto, and at a time when the materialman was threatening, at least by implication, to record a claim of Mechanic's Lien, the prime contractor desiring at the time, to prevent the blemish on his credit that would attach if a Lien were filed. Thereby the materialman relinquished both the inchoate right of Lien, estopped himself from filing the Claim of Lien, saved the prime contractor's credit from jeopardy and prevented the owner from having a right of action against the prime contractor for permitting the claim of Lien to be recorded against the owner's property.

Questions Involved.

As the writer sees it, this case turns upon the answers to the following questions:

(1) If a materialman, while he still has right to file a claim of Mechanic's Lien for materials furnished at the instance and request of a subcontractor, and furnished on a job basis, by an agreement direct with the prime contractor, waives the right to file his Claim of Lien in exchange for the contractor's agreement, made direct with him, that the prime contractor will pay direct to the materialman, the amount of the aforesaid material bill for materials used in the prime contractor's job and embraced within the requirements of the prime contractor's contract with the owner and if, in consummation of said agreement, payment is actually made within the Lien period to the materialman directly by the prime contractor, is the materialman entitled to retain the moneys so paid to him by the prime contractor as against the claim of a Trustee in Bankruptcy of the subcontractor, the payment by the prime contractor to the materialman having been made within four months prior to the bankruptcy of the subcontractor, assuming, for the purposes of this question, that the subcontractor was, at the time of the payment by the prime contractor, insolvent, and that the materialman had reasonable cause to believe that the subcontractor was insolvent?

(2) If the materialman who has furnished to the subcontractor, for use in a public works job, materials which

have been used in said job and while the materialman has an existing timely right to file a Stop Notice or Verified Notice to Withhold on a California Public Works job and has the right also to timely file an action against the prime contractor and his surety upon the Labor and Material Bond furnished under the mandatory provisions of the California Public Works Bond Act, makes a direct agreement with the prime contractor by which the materialman waives the right to file such a Stop Notice and agrees not to do so in exchange for an agreement made by the prime contractor with him that the prime contractor will pay direct the amount of the material bill, and if the materialman keeps his agreement, made with the prime contractor, on the consideration aforementioned, and, thereafter receives the check of the prime contractor, payable both to the materialman and the subcontractor and endorsed immediately by the subcontractor and cashed by the materialman, through the medium of depositing the check in his own account, entitled to retain the proceeds of said check in the exact amount of the materialman's bill on said job, as against the claim of the Trustee in Bankruptcy of the Estate of the subcontractor, the payment having been made within four months prior to the date of bankruptcy, assuming, for the purposes of this question, that the other aspects of a voidable preference appear?

ARGUMENT AND LAW.

POINT I.

This Case Is of Great Public Importance for Two Reasons: First, It Affects Very Seriously the Building Industry, One of the Largest Industries in the State of California, and Especially Affects Every Material Dealer and Many Subordinate Subcontractors; Second, It Sets Up a Ruling, if Upheld on This Appeal, That Will Make It a Difficult Task for Materialmen to Adopt the Ordinary and Customary Procedures Which for Years Have Been Adopted by Them to Preserve and Protect Their Interests Under the Salutary Provisions, as To Private Work of the Mechanics' Lien Law of the State of California and, as to Public Work, Under the Salutary Provisions of the California Public Works Bond Act and the California Statutes With Respect to the Cognate Right of Filing With the Public Body That Let the Prime Contract the Verified Claim or Stop Notice That Is the Equivalent to the Protection Afforded by a Mechanics' Lien on Private Work. The Procedure Suggested by the Ruling in the Trial Court Seems to Be to the Effect That the Only Way That the Materialman Can Protect His Interests Under These Laws, Founded Upon a Great and Wise Public Policy, Is to Actually Embarrass the Prime Contractor Involved in the Matter With the Actual Filing of a Mechanic's Lien on Private Work and With the Actual Filing, on Public Work, of the Stop Notice, or an Action Against the Prime Contractor and His Surety on the Statutory Labor and Material Bond, or Both. It Is the Practically Universal Custom in the Building Industry for the Materialman to Advise the Prime Contractor of His Unpaid Claim and to Insinuate, at Least, That, if It Was Not Paid Before the Ex-

piration of the Time to Record a Claim of Mechanic's Lien or, if the Matter Be a California Public Work, Before the Time Expires to File a Stop Notice or Notice to Withhold With the Public Body, the Materialman Intends to Do so Unless the Prime Contractor Will Pay Him Direct the Amount of the Bill Owed to Him by the Subcontractor. It is Likewise the Well Nigh Universal Practice, Where the Prime Contractor Is Presented with This Demand, to Make Out a Joint Check to the Subcontractor and the Materialman for the Amount of the Materialman's Bill, so That the Materialman Will Be Estopped From Adopting Any Procedure Protecting His Interests by the Actual Recording of the Claim of Lien or the Stop Notice, and so That the Prime Contractor Will Have Evidence That Through the Payment Made to the Materialman in This Manner, It Being Understood That the Subcontractor Will Endorse the Check Forthwith, so That the Materialman May Cash the Same, That as an Incident to the Prime Contractor's Agreement to Pay the Materialman Direct, the Prime Contractor Has Discharged, Pro Tanto, Any Amount That He May Owe the Subcontractor on the Job in Question. The Business Procedure Actually Adopted as an Habitual Practice in the Building Industry and Adopted in This Case, Through the Use of Either a Check Payable Solely to the Materialman for the Amount of His Bill, or a Joint Check for the Purposes Indicated Above, Is Consistent With the Practical Aspect of Business as It Is, and Should Be, Conducted. The Prime Contractor Usually Prefers the Medium of the Joint Check Procedure, and Is, More or Less, in a Position to Dictate the Course to Be Followed.

The widespreading scope of the effect of the decision of the Court below, and the great interest it has aroused in the industry has resulted in the request for permission to file this Brief, tendered by *Amicus Curiae*.

POINT II.

These Liens of Mechanics Against the Structure, Where Private Work Is Concerned, and Against the Fund in the Hands of the Public Body, Where Public Work Is Concerned, Are Liens of the Highest Dignity and Based Upon Equity and Natural Justice.

English v. Olympic Auditorium Co., 217 Cal. 631;

Jones v. Great Southern Fireproof Hotel Co., 86 Fed. 370, 30 C. C. A. 108;

Provident Institution for Savings v. Mayor of Jersey City, 113 U. S. 506, 28 L. Ed. 1102, 1106.

So impressed was the United States Supreme Court with the natural justice and equity of such claims, that in the last mentioned case it went so far as to say:

“We are not prepared to say that a legislative act giving preference to such liens, even over those already created by mortgage, judgment or attachment, would be repugnant to the Constitution of the United States.”

The California Supreme Court has expressed a similar feeling with respect to a kindred lien, in the case of *Mortgage Securities Co. v. Pfaffman*, 177 Cal. 109 at 113-114. The last mentioned action, it is true, had to do with the lien of the mechanic on an item of personal property which had not been affixed to real property, but held that the Lien claimant's possessory lien on the item of per-

sonal property into which his materials and labor had been incorporated was prior and paramount to a previously existing valid chattel mortgage, despite the provisions of Section 2897 of the Civil Code.

POINT III.

The United States Congress, in Its Enactment of the Bankruptcy Law, Has Seen Fit to Preserve Liens in Favor of the Laborers, Mechanics or Contractors Which Arise From the Performance of Labor or Furnishing of Material, Even Though It May Be Necessary, in Order to Perfect That Lien, to File Some Statutory Notice Under the Local Law, and That Such a Lien Is Not One Obtained by "Legal Proceedings" Within the Meaning of Clause (1) of Subdivision (a) of Section 67 of the Bankruptcy Act (11 U. S. C. A., Sec. 107(a), F. C. A. Title 11, Sec. 107(a)) as Amended by the Amendatory Act of 1938. The Courts Have Held That This Is True, Notwithstanding That Legal Proceedings Are Contemplated by the State Lien Statute and Required for the Enforcement of the Lien.

Henderson v. Mayer, 225 U. S. 631, 56 L. Ed. 1233;

In re New York-Brooklyn Fuel Corporation (C. A. 2), 11 F. 2d 802;

Tube City Mining and Milling Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203, L. R. A. 1916(e) 303;

Moreau Lumber Co. v. Johnson, 29 N. Dak. 113, 150 N. W. 563, L. R. A. 1915(f) 1132.

POINT IV.

The Lien of a Subcontractor, Laborer or Materialman for Services Rendered or Materials Furnished the Principal Contractor Is Not Nullified by the Bankruptcy of the Principal Contractor. This Is True Whether We Have to Do With a Mechanic's Lien on the Structure in the Case of a Private Job or the Lien in Favor of Materialmen, Created by Statute, Against Funds Due or to Become Due to the Prime Contractor From the Public Body Which Funds the Public Body Is Compelled to Withhold When Legal Notices of Claims Have Been Served on That Public Body.

Burr v. Commonwealth, 212 Mass. 534, 99 N. W. 323;

Burr v. Mass. School for Feeble Minded, 197 Mass. 357, 83 N. E. 883;

National Fireproofing Co. v. Daley, 76 N. J. Eq. 35, 74 Atl. 152;

Vanderlip v. Walker, 144 Misc. 629, 259 N. Y. Supp. 289, 21 Am. Bankr. Rep. (N. S.) 638;

In re Roy Emslie, 102 Fed. 291 (C. C. A. 2), 4 Am. Bankr. Rep. 147;

In re Ray Weston, 69 F. 2d 913, 98 A. L. R. 319 and annotations commencing at page 323;

In re Caswell Construction Co., 13 F. 2d 667.

POINT V.

There Are No Equitable Considerations in Favor of General Creditors of a Bankrupt Contractor Which Should Defeat the Lien of a Mechanic or Materialman Who Has Done Work or Furnished Material to Such Contractor; Every Creditor Dealing With a Debtor Does so With the Knowledge That Those Who Are Furnishing Labor or Materials for a Building Can, if They Choose, Acquire a Priority of Payment Over Other Creditors, Either by Recording a Claim of Lien Upon the Structure, Where Private Work Is Involved, or Taking Such Steps as Will Establish a Claim on the Fund in the Hands of the Public Body, Where Public Work Is Involved.

In re Emslie, 102 Fed. 291, 4 A. B. R. 127;

In re Cramond, 145 Fed. 966, 17 A. B. R. 22.

POINT VI.

A Mechanic's Lien Is Not a Lien Given by Way of Preference to Secure a Pre-existing Debt. Such Liens Come Rather Under the Exceptions of Section 67(d) of the Bankruptcy Act, Which Provides That Liens Given or Accepted in Good Faith, and Not in Contemplation of or in Fraud Upon the Bankruptcy Act, and for a Present Consideration, Which Have Been Recorded According to Law, If Recording Thereof Is Necessary in Order to Impart Notice, Shall Not Be Affected by the Bankruptcy Act. (Remington on Bankruptcy, 3rd Ed., Sec. 1430.)

The reason for the decisions and the statutes in this respect are that the liens of subcontractors and materialmen against a building or against a fund are given by the State statutes and stand on a different basis than the voluntary act of the bankrupt. The lien is not con-

sidered an encumbrance created by the debtor, and it has been said that even if such lien be understood to be a contractual lien, or arising out of a contract authorizing the labor and materials to be furnished, still it is supported by a consideration, and is preserved against invalidation through a provision in the Bankruptcy Act excepting from the four-months provision all Liens given or accepted for a present consideration.

Therefore, the service of a Stop Notice upon the owner or the filing of a Mechanic's Lien, or the creation of the Lien right, by the State Constitution or statute plus the action of the materialman in furnishing the materials are all involuntary in so far as the contractor is concerned, and hence not invalidated as a voluntary transfer by the contractor.

Fehling v. Goings, 87 N. J. Ed. 375, 58 Atl. 642,
12 A. B. R. 154.

See also:

In re Emsley, 102 Fed. 291 (C. C. A. 2), 4 A.
B. R. 127;

Dwelle-Kayser Co. v. Noon, 140 Wisc. 475, 250
N. Y. Supp. 714;

Vanderlip v. Walker, 144 Misc. 629, 259 N. Y.
Supp. 289, 21 A. B. R. (N. S.) 638;

In re New York-Brooklyn Fuel Corp., 11 F. 2d
802 (C. C. A. 2);

American Bowling Co. v. Central Tr. Co., 240 Fed.
401 (C. C. A. 7);

In re Caswell Constr. Co., 13 F. 2d 667, 8 Am.
Bankr. Rep. (N. S.) 31;

National Fireproofing Co. v. Daily, 76 N. J. Eq.
35, 74 Atl. 152;

Geo. Lowe & Co. v. Leary, 49 Utah 506, 164 Pac.
1052, 32 A. B. R. 774.

POINT VII.

Not Only the Materialman Creditor Who Extends Credit to a Subcontractor, or Prime Contractor, Knows That He Has the Right, if on a Private Job, to Record a Claim of Lien, and, if on a Public Job, to File a Stop Notice Against the Funds in the Hands of the Public Body, but This Is Also Known to All the General Creditors of the Prime Contractor, as Well as All the General Creditors of the Subcontractor.

The claimant who has furnished materials or labor on the particular job has a right to rely, in extending his credit to the general contractor or the subcontractor, on having the special Lien against the property or the fund accorded by the State law, and knowing this, is not at any time primarily concerned with the credit of the subcontractor. If on public works, he knows, in most States, including California, when he extends credit that he is protected by the bond written by the surety acting as surety for the general contractor, as well as by his direct right of action against the prime contractor, who is principal on that bond, and he is entitled to rely upon this additional cumulative and independent protection accorded to him by the State law.

Other creditors having claims against either the subcontractor or general contractor, not of a lienable nature, know the state of the law, and extend credit well knowing that those who have sold on a job basis their materials or performed their labor have a preferred position if they protect themselves by recording a claim of Mechanic's Lien or filing a Stop Notice, as the case may be. Even those employed on the same contract of the same general contractor know that if certain lienors comply

with the Mechanics' Lien Law in taking the steps necessary to protect their inchoate right of Lien, by either recording a claim of Mechanic's Lien on private work or a Stop Notice against the fund in the hands of the public body on public work, while others on the same job do not do so, the former acquire a priority over the latter in a fund owing to the bankrupt contractor.

In re Cramond, 145 Fed. 966, 17 A. B. R. 22.

Creditors of the general contractor, subcontractors under the general contractor, and materialmen, all know that when the owner begins to construct his building and engages a general contractor, and the contractor purchases materials or employs laborers or hires subcontractors, they all act with the Mechanics' Lien Law in view and with the knowledge on the part of all that the liability of the original contractor to materialmen, laborers and subcontractors, within the scope of the contract, may, on the failure of the contractor to meet that liability, be enforced against the property or the fund. (*Eberle v. Drennan*, 40 Okla. 59, 139 Pac. 162, 51 L. R. A. (N. S.) 68.) The Court in this case observed that it would be:

“ . . . a strange anomaly if, when that very condition arises and the original contractor affords himself of the bankruptcy statute, the law, which was made to protect such of his creditors, would then, when needed most, wholly fail.”

See also:

Chicasan Hotel Co. v. Barker Const. Co., 135 Tenn. 305, 186 S. W. 115, L. R. A. 1916F 106, 31 A. B. R. 916.

POINT VIII.

In the Case at Bar It Must Be Remembered That at the Time When Payment Was Made by the General Contractor to the Materialman Direct, That, While by so Doing He Was Incidentally Extinguishing the Indebtedness Owed by the Subcontractor to the Materialman, He Was Making a Payment to the Materialman in Exchange for a Direct Present Consideration Moving From the Materialman to the Prime Contractor, to wit: on the Public Works Job the Surrender of a Valid, Subsisting Right to File a Stop Notice or Verified Claim and Any Right on the Part of the Materialman to Sue Him, Along With the Surety on the Public Works Bond. A Present Consideration Was Moving From the Materialman to the Prime Contractor in Exchange for a Present Consideration Moving From the Prime Contractor to the Materialman, to wit: on the One Hand, Payment of the Sums Due to the Materialman for Materials Furnished for Use in and Used in the Prime Contractor's Job, and, on the Other Hand, Surrender of Present Existing Valuable Rights, Against a Third Party Independently Liable to the Materialman.

It would be a silly thing to require the idle act of embarrassing the prime contractor's credit, increasing expense to him unnecessarily for under the law among the costs that the prime contractor would have to pay in a suit either on the Stop Notice or upon the Public Works Bond would be the counsel fees of the successful Plaintiff. The day that the prime contractor signed his signature as principal on the statutory Labor and Material Bond and the surety for the prime contractor attached its

signature, all as required by law, each of these parties became indebted directly to anyone who might furnish materials to any subcontractor on the job in question for the full value of the materials furnished. The direct right of action on the Bond ripened when the moneys became due to the materialman from the subcontractor. The right to file the Stop Notice existed from any time after the materialman finished furnishing its materials and until the expiration of the statutory period for filing Stop Notices.

As to the Mechanics' Lien right, the California Constitution gives the right and permits the legislature merely to "provide, by law, for the speedy and efficient enforcement of such liens." The Lien dates back to the time when the first work is done or the first materials furnished by anyone in connection with the building contract. When the materialman on the private work waives the right to file his Claim of Lien he exchanges with the prime contractor, in return for the payment of his claim, a present valuable consideration in the shape of the waiver of the right to actually record the Claim of Lien. The mere incident that, in addition to the prime contractor paying the materialman the amount of his claim, there follows the legal consequence that, involuntarily the subcontractor has substituted the prime contractor as the owner of the claim theretofore held by the materialman is of no consequence.

POINT IX.

It Must Be Remembered That All of the Remedies Whether on Private or Public Work, That Are Given to a Materialman Who Sells Materials to a Subcontractor Are Separate, Distinct and Cumulative Remedies, Whether by Way of Stop Notice, Action on the Bond or Mechanic's Lien.

Sudden Lbr. Co. v. Singer, 103 Cal. App. 386, 390;

Holden v. Mensinger, 175 Cal. 300, 304;

Frater's Glass & Paint Co. v. So. Western Construction Co., 200 Cal. 688, 692-693;

General Electric Co. v. American Bonding Co., 180 Cal. 675, 679;

Cooley v. Freeman, 204 Cal. 59;

Pneucrete Corp v. U. S. F. & G., 7 Cal. App. 2d 733;

Sunset Lbr. Co. v. Smith, 91 Cal. App. 746;

Harvard v. Jurian, 35 Cal. App. 757;

Purington v. Olsten, 45 Cal. App. 621;

Associated Oil Co. v. Commory-Peterson Co., 32 Cal. App. 582, 589.

In view of this situation, how in common sense can it be said that if the prime contractor, under his direct liability, discharges his direct debt to the materialman for a present consideration moving to him and of great value to him, has made a payment which can be recovered by a Trustee in Bankruptcy of the subcontractor who has become bankrupt merely forsooth that, as an incident to the discharge of the prime contractor's direct debt, for a valuable consideration the contractor has discharged a separate and distinct obligation which the sub-

contractor happens to owe to the materialman from whom he has purchased the materials and the prime contractor has by such payments fulfilled his duty to the owner, whether that owner be a private party or a public body? The prime contractor has received a direct consideration from the materialman, the owner of the property has had the value of his property increased by the incorporation of those materials in the structure and the law has said that the materialman is entitled to extend credit to a subcontractor in reliance upon the proposition that he is going to be paid for those materials through the independent remedies furnished to him by law.

It is a matter of common knowledge, and every creditor of every subcontractor knows, that the whole credit structure of the building industry is based upon the following fundamental principles: hardly any subcontractor or prime contractor could undertake the volume of business that he is compelled to undertake in order to attempt to remain solvent if he could not get greater credit than he would ever be entitled to otherwise, through the medium of the credit protection given to him by reason of the fact that the law contains salutary, equitable and absolutely indispensable provisions by which other direct obligations are created against third parties and Liens are furnished either against the real property improved or against the funds in the hands of a public body. The public could not obtain public work at as low a cost as it is obtained by said public but for the fact that every materialman knows that as he furnishes a dollar of value of materials going into the public structure there directly arises, in his favor, by reason of that fact against the prime contractor and his surety (with neither of whom he has any direct contractual relationship), a direct obli-

gation on the part of the prime contractor and his surety to pay for that dollar's worth of materials. Similarly, by reason of the fact that no right of Lien exists on public work, the Legislature has provided a remedy by way of a mandatory Stop Notice, which must be regarded with favor by any Court for the reason that, since no right of Lien exists on the public work, the remedy thus afforded is a form of equitable subrogation.

Suisun Lbr. Co. v. Fairfield School District, 19 Cal. App. 595;

Bates v. Santa Barbara, 90 Cal. 543, 546-547;

Butler v. Ng Chung, 160 Cal. 438.

How can it be said, under these circumstances, that the assets of the bankrupt have been diminished by the surrendering, on the one hand, by the materialman, of his independent right of action against the third party by his waiver of the right to record a Claim of Lien or file a Stop Notice, while the right does still exist to do so, in exchange for the present payment of the independent obligation owed by the prime contractor? Upon the Stop Notice or the Lien or the suit on the Bond being carried forward by the materialman, an offset against any claim on the part of the subcontractor in a sum equal to the amount of the materialman's claim, which has been paid in exchange for such Release, is immediately created and all that has actually happened is to substitute the prime contractor or the bonding company, or both, as creditors of the subcontractor in the same amount, these parties having stepped into the shoes of the materialman to that extent.

The effect of a contrary theory would be to deprive the materialman of the independent right given to him by wise and essential statutory provisions.

The materialman in this case at bar had the absolute right, at the time, to pursue the separate independent remedies hereinbefore referred to on the respective jobs and surrendered those remedies in exchange for present payment by the prime contractor. In the case at bar the materialman, as a Lien claimant on private work, in the one instance, and as a furnisher of materials on public work, in the other instance, stands in a preferred position. The payment by the prime contractor was in response to a direct obligation on his part. Under the Bond, on the one hand, and on the other hand, in discharge of his obligation to the owner on the private work to keep that property free of Mechanics' Liens.

It would seem to be the doing of an idle act to require the actual filing of a Stop Notice or the actual recording of a Claim of Mechanic's Lien before the materialman could accept payment from the prime contractor of the debt in question. The prime contractor, knowing of the claims, and without the threat of the filing of any Stop Notice or recording of any claim of lien on private work, or action upon the Bond, in order to keep his credit standing and protect himself from unnecessary costs, might tender directly to the materialman (after having verified the correctness of his account, and after having verified the further legal fact that the right still existed on the part of the materialman to take the legal procedures open to him), the amount owing to the materialman. Must the materialman then reject that amount, fearing that possibly the subcontractor was a doubtful financial risk and might ultimately go into bankruptcy and such a suit as in the case at bar might follow, actually file his Stop Notice, actually record his Claim of Lien or his suit on the Bond, as the case may be, and then, and then

only, accept the sum which the prime contractor is ready, willing and eager to pay? Such a situation would, indeed, burden the building industry with the performance of idle acts against public policy, to the detriment of the credit of the prime contractor and contrary to what is a prudent, careful and proper business practice on the part of all parties concerned.

It does not appear to the writer of this Brief that there is anything in either the letter or the spirit of the Bankruptcy Act which requires any such course, and it appears that both equity and justice, as well as the law and common sense, impel the conclusion reached in the case of: *Jackson v. Flohr*, 119 Fed. Supp. 305 (U. S. D. C., W. D., Wash.), cited in the Brief of the Appellants. If to so hold, under the facts of this case, requires in any measure the overruling by this Honorable Court of the decision in *San Mateo Feed and Fuel Co. v. Hayward*, 149 F. 2d 875, that decision should be overruled.

The reasoning of the Court in *Jackson v. Flohr*, *supra*, is absolutely sound, is consistent with the undoubted legislative intent of Congress and with fundamental common sense and realistic in every respect. The law does not look with favor upon the performance of idle acts. There is no fundamental difference in the California and Washington statutes on the subject of Mechanics' Liens. It is true that there is an additional condition precedent to the right of Lien under the Washington law, to wit, the requirement that a materialman must, within five days after he has commenced the delivery of the materials, give to the owner a written notice that he has commenced to do so. Otherwise, he forfeits his right to a Lien. From that point forward the mechanics are identical.

In the case at bar the prime contractor, at the same stage of the proceedings as was involved in the Washington case above referred to, discharged his moral and legal obligation to the materialman while the right to record claim of Lien or file Stop Notice still existed and in exchange for a present valuable consideration as between prime contractor and materialman. Under such circumstances, we are really at a loss to understand how on earth it can be reasonably argued that this transaction between prime contractor and materialman resulted in a voidable preference because the transaction occurred within four months prior to the bankruptcy of the subcontractor.

It is true that under Section 67(b) of the Bankruptcy Act there is a limitation on transfers by the debtor of his own property. However, he made no such transfer. The prime contractor paid an obligation which the prime contractor owed and it violates common sense to conclude that by the prime contractor paying a debt that he owed to the materialman, directly to the latter, there is a voidable preference in bankruptcy merely because, as an incident to the discharge of this independent debt owed by the prime contractor, there was extinguished the obligation that the subcontractor owed to the materialman. It seems against all reason that the Bankruptcy Act or any of its sections should be so construed as to assume that Congress intended any such unjust and unreasonable end result as that contended for by the Trustee in Bankruptcy in this case.

Let us assume, so far as a private job is concerned, that the materialman was unpaid for materials, and the owner of said property, and not the prime contractor, learned that the materials were furnished either to his prime contractor or to one of the latter's subcontractors

and the materialman was about to record a Claim of Lien unless the owner paid the bill, and the owner tendered payment therefor. Can it reasonably be contended under these circumstances that the materialman would first have to record his Claim of Lien, antagonize the owner and possibly, by reason of the antagonization thus created, be required to go through the trouble, expense and delay of a Mechanic's Lien foreclosure action, the end result of which was known to be inevitably in the materialman's favor? It does not stand to reason that any such end result is contemplated under any proper construction of the Bankruptcy laws of the United States of America and especially under any of the provisions of Section 67(b) or Section 60 of the Bankruptcy Act.

Respectfully submitted,

GLEN BEHYMER,

Amicus Curiae.

No. 14,917

In the

United States Court of Appeals

For the Ninth Circuit

CALIFORNIA STATE BOARD OF EQUALIZATION,
Appellant,

vs.

GEORGE T. GOGGIN, Trustee of the Estate
of Columbia Stamping and Manufac-
turing Corporation, Bankrupt,
Appellee.

Appellant's Opening Brief

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SUBJECT INDEX

| | Page |
|---|------|
| Preliminary Jurisdictional Statement..... | 1 |
| Statement of the Case..... | 2 |
| Specification of Errors..... | 5 |
| Argument | 7 |
| I. Summary of Argument..... | 7 |
| II. The California Use Tax Is Imposed on Purchasers for the Privilege of Using Tangible Personal Property in This State | 9 |
| III. The Bankruptcy Court Has No Jurisdiction to Enjoin the State of California from Collecting a Use Tax from Persons Using Property Purchased from a Trustee in Bankruptcy | 13 |
| IV. The Milton J. Wershow Company Is Liable to the State of California for Use Tax on the Privilege of Using Tangible Personal Property in This State..... | 15 |
| 1. Introductory Statement | 15 |
| 2. The Milton J. Wershow Company Is Subject to the California Use Tax Since It Purchased Tangible Personal Property from a Retailer for Use in This State and Used the Property in This State..... | 16 |
| V. To Require George T. Goggin to Collect the Use Tax from the Milton J. Wershow Company Would Not Interfere with the Performance of His Functions as a Trustee in Bankruptcy..... | 22 |
| Conclusion | 28 |

TABLE OF AUTHORITIES CITED

| CASES | Pages |
|---|----------------|
| Brandtjen & Kluge v. Fincher, 44 Cal. App. 2d 939, 111 P.2d 979 | 23 |
| California State Board of Equalization v. Goggin, 191 F.2d 726 | 12, 19, 20, 21 |
| Chicago Bridge and Iron Company v. Johnson, 19 Cal. 2d 162, 165, 119 P.2d 945, 947..... | 8, 10, 26 |
| City of New York v. Jersawit, 85 F.2d 25 (Second Circuit).... | 9, 11, 26, 27 |
| Colorado National Bank v. Bedford, 310 U.S. 41, 60 Sup. Ct. 800 | 25, 26 |
| Corbett v. Printers & Publishers Corp., 127 F.2d 195 [Ninth Circuit] | 15 |
| Felt & Tarrant v. Gallagher, 306 U.S. 62, 59 Sup. Ct. 376..... | 23, 24 |
| General Trading Co. v. Tax Comm'n, 322 U.S. 355, 64 Sup. Ct. 1019 | 10, 24 |
| Henneford et al. v. Silas Mason Co., Inc., et al., 300 U.S. 577, at 582, 57 Sup. Ct. 524 at 526..... | 14 |
| Krull, In re, 295 Fed. 520, 521 (District Court E.D. N.Y.)..... | 14 |
| Market Street Railway Company v. California State Board of Equalization, 137 A.C.A. 100, 290 P.2d 20..... | 17, 18, 19, 20 |
| McLeod v. Dilworth Co., 322 U.S. 327, 64 Sup. Ct. 1023..... | 10, 24 |
| New York v. Jerusalem, 85 F.2d 25 (Second Circuit)..... | 9 |
| Oak Park Cleaners and Dyers, In re, 125 F.2d 420 [Seventh Circuit] | 8, 14 |
| Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 at 353, 69 Sup. Ct. 561 at 567..... | 14 |
| Southern Pacific Co. v. Gallagher, 306 U.S. 167, 59 Sup. Ct. 389 | 7, 8, 10, 26 |
| Sutter Packing Company v. California State Board of Equalization, 139 A.C.A. 983, 294 P.2d 1083..... | 17, 18, 19, 20 |

STATUTES

Bankruptcy Act (11 U.S.C., Section 47a)

| | |
|-------------------|---|
| Section 24a | 1 |
| Section 322 | 3 |

California Revenue and Taxation Code

| | |
|---------------------------|---------------------|
| Section 6001, et seq..... | 4, 5 |
| Section 6008 | 10 |
| Section 6009 | 10 |
| Section 6015(a) | 20 |
| Section 6019 | 20, 21 |
| Section 6201, et seq..... | 7, 8, 9, 16, 17, 21 |
| Section 6203 | 8, 23 |
| Section 6241 | 16 |
| Section 6931, et seq..... | 15 |

California Sales and Use Tax Law (California Revenue and Taxation Code, Section 6001 et seq.).....

1, 2, 4, 5, 6, 7, 16, 17, 20, 21, 22, 23, 26, 27, 28

| | |
|------------------------------|----|
| 28 U.S.C., Section 1341..... | 15 |
|------------------------------|----|

No. 14917

In the

United States Court of Appeals

For the Ninth Circuit

CALIFORNIA STATE BOARD OF EQUALIZATION,
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GEORGE T. GOGGIN, Trustee of the Estate
of Columbia Stamping and Manufac-
turing Corporation, Bankrupt,
Appellee.

Appellant's Opening Brief

PRELIMINARY JURISDICTIONAL STATEMENT

The within appeal is taken pursuant to an Order of this Court filed April 4, 1956, upon appellant's petition pursuant to section 24(a) of the Bankruptcy Act, 11 U.S.C., section 47(a), for the allowance of an appeal from an order (Tr. 100) of the United States District Court for the Southern District of California, Central Division, entered on June 20, 1955. The District Court denied appellant's petition for review of an order (Tr. 79) entered by the Honorable Hugh L. Dickson, Referee in Bankruptcy, enjoining appellant from enforcing provisions of the California Sales

and Use Tax Law with reference to tangible personal property purchased by the Milton J. Wershow Company from George T. Goggin, Trustee in Bankruptcy of the Estate of Columbia Stamping and Manufacturing Corporation, Bankrupt.

STATEMENT OF THE CASE

The State of California imposes a three percent use tax on persons storing or using tangible personal property in this State. The use tax is imposed on the purchaser rather than on the seller. This case involves the validity of an order of the referee in bankruptcy, confirmed by the District Court, permanently enjoining the State of California and the State Board of Equalization from collecting a use tax *from private persons who were not parties to the bankruptcy proceeding* with respect to items purchased by such private persons from George T. Goggin, the Trustee in Bankruptcy of Columbia Stamping and Manufacturing Corporation, who was liquidating the assets of the bankrupt, and also enjoining the State of California and the California State Board of Equalization from collecting such use tax from George T. Goggin, Trustee in Bankruptcy, either in his capacity of trustee or in his individual capacity (Tr. 79). The order of the referee was issued nine months after the items sold by the trustee had ceased to be a part of the bankrupt estate.

The issues presented in this case are as follows:

1. Does the bankruptcy court have jurisdiction to enjoin the State of California from collecting a use tax, imposed on the privilege of using tangible personal property in this State, from persons who are not parties to any bankruptcy proceeding solely because the tangible personal property had been acquired from a trustee in bankruptcy liquidating the assets of a bankrupt estate?

2. If the answer to the above question is in the negative, it is necessary to consider if it would be contrary to the provisions of the Bankruptcy Act for the trustee in bankruptcy to be required to collect the use tax from the purchaser and transmit it to the State of California.

There does not appear to be any dispute as to the operative facts of this case which are as follows:

Columbia Stamping and Manufacturing Corporation, the bankrupt herein, filed its petition under the provisions of Section 322 of the Bankruptcy Act on October 29, 1946. On or about February 27, 1947, the petition for arrangement having failed, an order was made adjudging Columbia Stamping and Manufacturing Corporation, a bankrupt, and directing that bankruptcy be proceeded with. On or about October 29, 1946, George T. Goggin became the duly appointed, qualified and acting receiver herein, and on or about March 3, 1947, he became the duly appointed, qualified and acting trustee herein (Tr. 70).

Prior to the date of bankruptcy, Columbia Stamping and Manufacturing Corporation was engaged in the stamping and manufacturing business. The operation of this business was continued by George T. Goggin as receiver and, subsequently, as trustee from the date of bankruptcy to January 5, 1954. The referee in bankruptcy, on January 5, 1954, orally directed liquidation of the assets of the bankrupt estate and confirmed a sale of all or substantially all of the physical assets of the bankrupt estate to Milton J. Wershow Company, a copartnership composed of Milton J. Wershow and Gladys R. Wershow. A written order confirming the sale was entered on or about the 13th day of January, 1954. Included in assets sold to the Milton J. Wershow Company were items of tangible personal property valued in the sum of \$10,620.23, all of which had been

used by the trustee in the operation of the business. The items of tangible personal property were not purchased for resale by the Milton J. Wershow Company but were purchased for use by that Company and were actually used by the Company in this State. The tax thereon under the provisions of California Sales and Use Tax Law (California Revenue and Taxation Code, sections 6001, et seq.) if applicable, amounts to \$318.61 (Tr. 71).

The personal property involved in the instant case had been used by the appellee, George T. Goggin, for a period of approximately seven (7) years immediately preceding January 5, 1954, first as receiver and then as trustee of the bankrupt estate in the course of the operation of the business of the bankrupt. In operating the business of the bankrupt during this period, the appellee, George T. Goggin, regularly made numerous sales of tangible personal property at retail and paid sales taxes thereon to the California State Board of Equalization. It is not disputed that George T. Goggin was a retailer throughout the period in which he operated the business of the bankrupt (Tr. 51, 52, 101).

No tax or debt of any kind, based on the sale by George T. Goggin to the Milton J. Wershow Company, or based on the storage, use or other consumption in the State of California of the aforesaid personal property by that Company, has been paid to either the State of California or the Board of Equalization by either the trustee or the Company; and no sum was collected by the trustee from the Company for any such tax (Tr. 72).

The Board of Equalization is the duly constituted administrative agency of the State of California, charged with the enforcement of the provisions of the California Sales and Use Tax Law (California Revenue and Taxation Code, Sec-

tion 6001, et. seq.) and the collection of the taxes imposed thereunder (Tr. 72).

On or about April 15, 1954, George T. Goggin filed a petition with the Bankruptcy Court for an order enjoining the State of California from asserting any tax or claim against the Milton J. Wershow Company on the property which that Company had purchased on January 5, 1954, and enjoining the State of California from asserting any tax or claim against George T. Goggin, the Trustee in Bankruptcy because of this transaction (Tr. 42). On October 22, 1954, the Honorable Hugh L. Dickson, Referee in Bankruptcy, entered an order permanently enjoining the State of California and the State Board of Equalization "from collecting, or attempting to collect from George T. Goggin, either as trustee of the estate of Columbia Stamping and Manufacturing Corporation, Bankrupt, or individually, or from Milton J. Wershow Company * * * any tax or debt of whatsoever nature arising from, or based upon any of the provisions of the Sales and Use Tax Law of the State of California" with respect to the property purchased by the Milton J. Wershow Company on January 5, 1954, which is referred to above (Tr. 79). The California State Board of Equalization petitioned for a review of this order. On June 20, 1955, the petition for review was denied by the Honorable Ben Harrison, one of the judges of the United States District Court for the Southern District of California, Central Division, and the order of the referee in bankruptcy was confirmed, ratified and approved (Tr. 100).

SPECIFICATION OF ERRORS

1. The court below erred in concluding that it had jurisdiction to enjoin the State of California and the California State Board of Equalization from collecting from the Milton

J. Wershow Co. use tax imposed for the privilege of using tangible personal property in this State.

2. The court below erred in concluding that the State of California was and is prohibited by the Constitution and the laws of the United States from taxing the storage, use or other consumption of tangible personal property purchased from a trustee in bankruptcy. The court erred in including a statement to this effect in its findings of fact (Finding IV, p. 72) since this is clearly a conclusion of law on one of the legal issues here involved.

3. The court below erred in holding that requiring either Mr. Goggin, in his fiduciary or individual capacity, or his vendees to comply with the use tax provisions of the California Sales and Use Tax Law would constitute an unlawful interference with the administration of the Bankruptcy Act.

4. The court below erred in permanently restraining the State of California, and its duly constituted agency, the California State Board of Equalization, from enforcing the use tax provisions of the California Sales and Use Tax Law against Mr. Goggin in his individual, as well as fiduciary capacity, or against said Milton J. Wershow Company and/or its individual partners.

5. The court below erred in overruling the objections of the State of California, and its duly constituted agency, the California State Board of Equalization, to the jurisdiction of the court below in this matter.

6. The court below erred in failing to recognize that the Milton J. Wershow Company was subject to the California use tax by virtue of purchasing tangible personal property from a retailer for use in this State, and using such property in California.

7. The court below erred in failing to recognize that it is the buyer who is liable for the use tax imposed by the

California Sales and Use Tax Law upon the storage, use or other consumption of said tangible personal property by the buyer in California and that the seller is obligated to collect the tax from the buyer and remit it to the State.

8. The court below erred in failing to recognize that it was enjoining the collection of a tax which was not imposed upon appellee or the bankrupt estate involved herein or upon any of the assets belonging to said estate.

9. The court below erred in holding that none of the use tax provisions of the California Sales and Use Tax Law apply to George T. Goggin either in his individual capacity or as trustee in bankruptcy, or to the purchaser, the Milton J. Wershow Company, with regard to the transactions involved herein.

ARGUMENT

I. Summary of Argument

The two primary issues involved in this case are :

(1) Does a bankruptcy court have jurisdiction to enjoin the State of California from collecting a use tax from a person who purchases property from a trustee in bankruptcy who is liquidating the assets of a bankrupt estate?

(2) May a trustee in bankruptcy be required to collect the use tax from a purchaser and transmit this tax to the California State Board of Equalization?

The California use tax is imposed for the privilege of storing and using tangible personal property in this State (*Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 59 Sup. Ct. 389). The legal incidence of the tax is on the purchaser of the property and the liability for tax arises because of his use of the property in this State (California Revenue and Taxation Code, sections 6201, et seq.; *Southern Pacific*

Co. v. Gallagher, supra; Chicago Bridge & Iron Co. v. Johnson, 19 Cal. 2d 162, 119 Pac. 2d 945).

The jurisdiction of the bankruptcy court may not extend to property which has ceased to be a part of the bankrupt estate (*In re Oak Park Cleaners and Dyers*, 125 F.2d 420 [Seventh Circuit]). It is clear, therefore, that a court of bankruptcy is without jurisdiction to enjoin the collection of a use tax from a person using tangible personal property in this State who is not a party to the bankruptcy proceeding merely because the property, prior to the time it was purchased and used, had been part of the bankrupt estate. It follows that the bankruptcy court in the instant case was without jurisdiction to enjoin the State of California from collecting use tax from the Milton J. Wershow Company.

The effect of the order of the bankruptcy court is to prevent the State of California from collecting a tax which is properly due and owing from the purchaser. The purchaser, Milton J. Wershow Company, was subject to the California use tax for the privilege of using tangible personal property which it purchased from a retailer for use in this State (California Revenue and Taxation Code, Section 6201, et seq.).

It remains to consider if George T. Goggin, the trustee in bankruptcy, may be required to collect the use tax from the Milton J. Wershow Company and transmit the tax to the State of California. Under the provisions of the California Sales and Use Tax Law, a retailer maintaining a place of business in this State is required to collect the use tax from a purchaser who is purchasing for use in this State and to transmit the tax so collected to the State of California (California Revenue and Taxation Code, section 6203). Since George T. Goggin, at the time he made the sale here in controversy, was a retailer maintaining a place of busi-

ness in California, he should have collected the use tax. Doing so would not interfere with the performance of his functions under the Bankruptcy Act. In *New York v. Jersawit*, 85 F.2d 25 (Second Circuit), it was expressly held that the collection by a trustee in bankruptcy liquidating the assets of a bankrupt estate of a sales tax imposed on the purchaser would not interfere with the performance of the trustee's functions and that the trustee should be required to collect such tax.

The collection of the use tax by the trustee will not interfere with his ability to dispose of the assets of the bankrupt estate since the purchaser will be required to pay the same amount of use tax regardless of whether the tax is collected from him by the trustee in bankruptcy or is collected from him directly by the State of California. Accordingly, the order of the court below should be reversed and the appellant should be permitted to enforce the provisions of the California use tax law with respect to the transaction here involved.

II. The California Use Tax Is Imposed on Purchasers for the Privilege of Using Tangible Personal Property in This State

Since this case involves the application of the California use tax, it is desirable at the outset to explain briefly the nature and incidence of that tax.

The use tax is imposed pursuant to Section 6201 of the Revenue and Taxation Code which, so far as here relevant, provides:

“An excise tax is hereby imposed on the storage, use, or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this State at the rate of three percent of the sales price of the property. * * *”

Section 6008 defines "storage" as "any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside of this State of tangible personal property purchased from a retailer".

Section 6009 defines "use" as "the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business."

It is apparent from these statutory provisions that the California use tax is imposed on the purchaser rather than on the seller and that it is the activity of the purchaser in storing or using the property in this State after its purchase which gives rise to the liability for this tax and the United States Supreme Court so held in *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 59 Sup. Ct. 389.

The use tax is designed to complement the sales tax and to prevent discrimination against local suppliers. *Chicago Bridge and Iron Company v. Johnson*, 19 Cal. 2d 162, 165, 119 P.2d 945, 947. It is frequently applied in situations where items are purchased in another state and brought into California to be used here, i.e., an automobile purchased in Detroit by a California resident for use in this state. The Supreme Court of the United States has recognized that because of the difference in legal incidence of the sales and use tax, a use tax may be imposed under circumstances in which the imposition of the sales tax would be barred by the provisions of the federal Constitution (*General Trading Co. v. Tax Comm'n*, 322 U. S. 355, 64 Sup. Ct. 1019; Cf. *McLeod v. Dilworth Co.*, 322 U. S. 327, 64 Sup. Ct. 1023). In *McLeod v. Dilworth*, 322 U. S. 327, at 330, 64 Sup. Ct. 1023, at 1026, the Court said:

“* * * A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. * * *

“* * * Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated taxes on different transactions and for different opportunities afforded by a State.”

It is apparent from the foregoing discussion that the use tax is an excise tax imposed on the purchaser, as contrasted with a sales tax imposed on a retailer. The legal incidence of the two taxes is different and this difference in legal incidence has been recognized as significant by the United States Supreme Court in determining the validity of the imposition of such taxes.

The significance of the legal incidence of a tax was also recognized in *City of New York v. Jersawit*, 85 F.2d 25 (Second Circuit). The *Jersawit* case presented an issue similar to that involved in the instant case, namely: whether a trustee in bankruptcy making sales in the liquidation of the assets of a bankrupt estate is required to collect a tax imposed on purchasers. The Court held that the trustee should collect the tax. In that regard, the Court said:

“* * * A tax on a sale made by a trustee under an order of court for purposes of liquidation if payable directly and primarily by him would doubtless be a burden on a governmental instrumentality, for a judicial sale in liquidation of a bankrupt estate would in a peculiar sense involve the exercise of a federal function. Indeed, without the exercise of such a function and the power thus to dispose of assets, administration in bankruptcy would hardly be practicable. A tax on the vendee in

connection with a sale in liquidation of a bankrupt's estate is, at least in a formal sense, quite different from a tax for which the vendor is made primarily liable. Not only would the tax be on the purchaser, rather than the trustee, but it would be a tax equivalent to that imposed on all persons in the community similarly situated. It is the policy of the courts ordinarily to treat such general taxes as valid. The limitation of exemptions to taxes directly and substantially interfering with government functions is being adhered to with more and more strictness. *Indian Territory Illuminating Oil Co. v. Board of Com'rs*, 288 U. S. 325, 53 S. Ct. 388, 77 L.Ed. 812; *Fox Film Corp. v. Doyal*, 286 U. S. 123, 52 S.Ct. 546, 76 L.Ed. 1010; *Helvering v. Powers*, 293 U. S. 214, 55 S.Ct. 171, 79 L.Ed. 291; *United States Trust Co. v. Anderson* (C.C.A.) 65 F. (2d) 575, 89 A.L.R. 994.

"The purchaser at the judicial sale was only required to pay the same tax he would have been bound to pay if he had purchased from anyone else. What the trustee is really complaining of is, not that a burden has been imposed upon the exercise of his functions, but of his inability to sell to a purchaser who would be exempt from a tax and because of such an exemption would pay a higher price to him than would ordinarily be paid for the goods sold. It seems unreasonable to treat the absence of an exemption from taxes as a burden upon the normal exercise of a governmental function." (85 F.2d 25, at 27)

We have stressed the fact that the legal incidence of the California use tax is on the purchaser and not on the seller because the bankruptcy court in the instant case failed to recognize this. The bankruptcy court based its order on the erroneous conclusion that the decision of this Court in *California State Board of Equalization v. Goggin*, 191 F.2d 726, which related solely to the imposition of a sales tax on a

trustee in bankruptcy liquidating a bankrupt estate, was controlling in the instant case which involves the imposition on the purchaser of the use tax for the privilege of using in this state property purchased from a trustee in bankruptcy.

III. The Bankruptcy Court Has No Jurisdiction to Enjoin the State of California from Collecting a Use Tax from Persons Using Property Purchased from a Trustee in Bankruptcy

In October, 1954, the bankruptcy court permanently enjoined the State of California and the California State Board of Equalization from collecting, or attempting to collect, use tax from the Milton J. Wershow Company for exercising the privilege of using in this State the tangible personal property purchased by that Company from George T. Goggin in January of 1954 (Tr. 79). (Our prior discussion has shown that the liability of a purchaser to pay the California Use Tax arises because of his activities in storing or using such property after its purchase.) Thus, approximately nine months after certain assets ceased to be a part of the bankrupt estate, the bankruptcy court permanently enjoined the State of California from collecting a tax from a person who was not a party to a bankruptcy proceeding—a tax which resulted from activities of the purchaser wholly unrelated to the bankruptcy proceeding, namely, the purchaser's storage and use of the property in California after its purchase from the trustee in bankruptcy.

The first question which must be considered is whether a court of bankruptcy has jurisdiction to enjoin the collection of a state tax on the use of property which has ceased to be a part of the bankrupt estate. It would appear to be so axiomatic that a bankruptcy court loses jurisdiction over property which has ceased to be a part of the bankrupt estate that an extensive discussion of the matter appears

unnecessary. This principle was clearly stated in *In re Oak Park Cleaners and Dyers*, 125 F.2d 420, 422 (Seventh Circuit). See, also, *In re Krull*, 295 Fed. 520, 521 (District Court E.D. N.Y.) Yet in the instant case the referee in bankruptcy purported to exercise such jurisdiction solely because many months earlier the property had been purchased from a trustee in bankruptcy who was liquidating the assets of a bankrupt estate. This attempt by the bankruptcy court to grant immunity from taxation to property no longer under the jurisdiction of the bankruptcy court is directly contrary to the principle of law stated by the United States Supreme Court in *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342 at 353, 69 Sup. Ct. 561 at 567, as follows:

“Despite the possibility that the prospect of taxation by the state may reduce the amount the United States might receive from the sale of its property, it is well established that property purchased by a private person from the Federal Government becomes a part of the general mass of property in the state and must bear its fair share of the expenses of government.”

The similarity of a use tax and a property tax was clearly pointed out in *Henneford et al. v. Silas Mason Co. Inc., et al.*, 300 U.S. 577, at 582, 57 Sup. Ct. 524 at 526 where the Court said:

“The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. * * * A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively.” (Citations omitted.)

It follows that the bankruptcy court has no more jurisdiction to enjoin the collection of the California use tax from

a person using assets purchased from a trustee in bankruptcy than it has to enjoin the collection of a property tax from the purchaser, the liability for which arises in the period subsequent to the confirmation of the sale by the trustee in bankruptcy.

As the foregoing discussion has shown the bankruptcy court clearly exceeded its jurisdiction in enjoining the State of California from collecting use tax with respect to property which had ceased to be a part of the bankrupt estate. It should be noted, moreover, that the provisions of the California Sales and Use Tax Law provide a plain, speedy and adequate remedy by which the Milton J. Wershow Company may challenge the validity of the imposition of the use tax on the transaction here involved (California Revenue and Taxation Code, sections 6931, et seq.; *Corbett v. Printers & Publishers Corp.*, 127 F.2d 195 [Ninth Circuit]), Under such circumstances a federal district court is without jurisdiction to enjoin the collection of the state tax. (28 U.S.C. § 1341; *Corbett v. Printers & Publishers Corp.*, *supra*). Moreover, the California Sales and Use Tax Law expressly prohibits the use of an injunction to restrain the collection of the taxes imposed under that law (California Revenue and Taxation Code, section 6931).

IV. The Milton J. Wershow Company Is Liable to the State of California for Use Tax on the Privilege of Using Tangible Personal Property in This State

I. INTRODUCTORY STATEMENT.

In the preceding section, it has been shown that the bankruptcy court had no jurisdiction to enjoin the State of California from collecting use tax from the Milton J. Wershow Company because of that Company's use of property which was no longer a part of the bankrupt estate. It has also been

pointed out that the injunction was not proper since the Milton J. Wershow Company had adequate remedies at law. Assuming, *arguendo*, that the bankruptcy court had jurisdiction, its order was, nevertheless, improper since, as the discussion which follows will show, the use tax was properly applicable to the Milton J. Wershow Company and the effect of the order of the bankruptcy court, enjoining the State of California from collecting or attempting to collect the use tax from the Milton J. Wershow Company, is to prevent the collection of a tax which the Company owes to the State under the substantive law here applicable.

2. THE MILTON J. WERSHOW COMPANY IS SUBJECT TO THE CALIFORNIA USE TAX SINCE IT PURCHASED TANGIBLE PERSONAL PROPERTY FROM A RETAILER FOR USE IN THIS STATE AND USED THE PROPERTY IN THIS STATE.

Section 6201 of the California Revenue and Taxation Code provides:

“An excise tax is hereby imposed on the storage, use, or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this State at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter.”

There is no dispute in this case that the property here in controversy was purchased by the Milton J. Wershow Company for use in this State and that the property was used by the company in this State (Tr. 71; California Revenue and Taxation Code section 6241 [Presumption that goods delivered in this State are purchased for use here]).

In ascertaining whether the use tax applies to the transaction here in controversy, it remains to consider if the Milton J. Wershow Company “purchased from a retailer”

within the meaning of section 6201 of the California Revenue and Taxation Code. There is no dispute between the parties that throughout the period in which he was operating the business of the Columbia Stamping and Manufacturing Corporation, George T. Goggin was a retailer by virtue of making numerous retail sales of tangible personal property on which he paid to the State of California the sales tax applicable to retailers (Tr. 52, 101). It is also undisputed that the assets which George T. Goggin sold to the Milton J. Wershow Company were used by Mr. Goggin in conducting the business of the bankrupt including the retail selling actively referred to above (Tr. 101). It is apparently the position of the appellee, however, as evidenced by the arguments which were made in the court below, that George T. Goggin ceased to be a retailer when he began to liquidate the assets of the bankrupt. It is therefore necessary to consider first, if, a person who has carried on retail selling activities in this state, loses his status as a retailer if he sells all the assets used in his business. The precise question was considered in two recent decisions of the California courts, *Market Street Railway Company v. California State Board of Equalization*, 137 A.C.A. 100, 290 P.2d 20, and *Sutter Packing Company v. California State Board of Equalization*, 139 A.C.A. 983, 294 P.2d 1083 (petition for hearing in California Supreme Court filed April 27, 1956) which were decided by different divisions of the District Court of Appeal for the First Appellate District. In both of these cases, it was held that a person who has become a retailer while conducting his business operations remains a retailer subject to the provisions of the Sales and Use Tax Law while selling his business assets.

Market Street Railway Company was a public service corporation engaged in the transportation business in San

Francisco and San Mateo counties. Between 1933 and 1948, it made approximately 900 retail sales of tangible personal property. In September of 1944, Market Street Railway Company sold its operative properties to the City and County of San Francisco and discontinued its transportation business. The value of the tangible personal property involved in this transfer was \$2,891,578.83. In *Market Street Railway Company v. California State Board of Equalization*, 137 A.C.A. 100, 290 P.2d 20, the court held that Market was subject to a sales tax on all its retail sales including the sale of its operative properties to the City and County of San Francisco in September, 1944, and the additional liquidation sales it made thereafter, since Market Street Railway Company had become a retailer by virtue of its sales of obsolete equipment and since the statute provided no exemption for the sale of a business by a retailer. In reaching its decision, the court rejected an argument by Market Street Railway Company that the tax could not be applied to liquidation sales.

In *Sutter Packing Company v. State Board of Equalization*, 139 A.C.A. 983, 294 P.2d 1083, the factual situation was similar to that in the *Market Street Railway* case. Sutter Packing Company was primarily engaged in the processing and packing of fruits and vegetables for human consumption which were not subject to sales tax. However, Sutter Packing Company made numerous sales of used and obsolete equipment and supplies over a period of years on which it paid sales tax. In 1949, Sutter Packing Company decided to discontinue its packing operations. It immediately commenced negotiations for the sale of its remaining machinery and equipment. Several months after it had ceased its packing operations, it completed the sale of the remaining equipment and machinery used in its packing business for

the sum of \$700,000. It was contended by Sutter Packing Company that it was not a retailer at the time it made the final sale of machinery and equipment, but that it had ceased to be a retailer when it discontinued its packing business and commenced the liquidation of its assets. In addition, Sutter contended that the sale of all its machinery and equipment was exempt as an occasional sale. The court held that Sutter Packing Company continued to be a retailer at the time it sold its remaining machinery and equipment in June of 1949. The court rejected Sutter's contentions that this transaction was exempt from taxation because it was a sale made in putting an end to a business. The court also held the transaction was not exempt as an occasional sale.

It is clear from the opinions in the *Market Street Railway Company* case and the *Sutter Packing Company* case that under California law a person does not cease to be a retailer when he is selling all of the assets used in his business operations. To support a contrary view, the appellee, George T. Goggin, in the court below, relied primarily on *California State Board of Equalization v. Goggin, trustee in bankruptcy of the Estate of West Coast Cabinet Works, Inc.*, 191 F.2d 726 (Ninth Circuit). The Court in that case apparently believed that it was the California law that a person ceased to be a retailer when he commenced the liquidation of the assets of his business. In both *Market Street Railway v. State Board of Equalization*, 137 A.C.A. 100, 290 P.2d 20, and *Sutter Packing Company v. State Board of Equalization*, 139 A.C.A. 983, 294 P.2d 1083, the taxpayers placed great reliance on *California State Board of Equalization v. Goggin*, 191 Fed. 2d 726, as supporting the proposition that the sale of assets in the liquidation of a business is not subject to the sales tax. The arguments were considered and rejected in the opinions of the District Court of Appeal in each of these cases as contrary to the

holdings of the California Supreme Court as to the meaning of the provisions of the California Sales and Use Tax Law.

It is clear, therefore, that to the extent that *California State Board of Equalization v. Goggin, trustee in bankruptcy of West Coast Cabinet Works, Inc.*, 191 F.2d 726, suggests that a person loses his status as a retailer when he liquidates his business, the case is directly contrary to the *Market Street Railway* case and to the *Sutter Packing Company* case, and does not correctly state the California law. As this Court recognized in *California State Board of Equalization v. Goggin, supra*, the construction of the California tax is a matter of state law which is binding upon the federal courts (191 F.2d 726, at 729).

Nor can it be contended that under California law, a trustee in bankruptcy liquidating the assets of a bankrupt estate is not included in the definition of the term "retailer". The California Sales and Use Tax Law defines retailer in Section 6015(a) of the Revenue and Taxation Code as follows:

" 'Retailer' includes:

(a) Every seller who makes any retail sale or sales of tangible personal property, and every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others."

An additional definition of retailer is set forth in section 6019 of the California Revenue and Taxation Code. Section 6019 provides:

"Every individual, firm, copartnership, joint venture, trust, business trust, syndicate, association or corporation making more than two retail sales of tangible personal property during any 12-month period, including sales made in the capacity of assignee for the benefit of creditors, or receiver or trustee in bank-

ruptcy, shall be considered a retailer within the provisions of this part in his or its individual firm, copartnership, joint venture, trust, business trust, syndicate, associate or corporate capacity." (Emphasis added.)

It should be noted that the definition of retailer which is set forth in section 6019 was added to the Sales and Use Tax Law in 1951 and was not in effect in the period involved in *California State Board of Equalization v. Goggin, trustee in bankruptcy of West Coast Cabinet Works, Inc.*, 191 F. 2d 726. For this reason this Court did not have occasion to consider this additional definition of retailer in the opinion which it rendered in that case.

It is apparent from the definition in section 6019 of the California Revenue and Taxation Code that a trustee in bankruptcy who makes more than two retail sales in any 12-month period is a retailer under the California Sales and Use Tax Law. This definition of retailer does not distinguish between sales made in carrying on the business of the bankrupt on the one hand and sales made in liquidating the bankrupt's estate on the other.

From the foregoing discussion it is clear that in the instant case George T. Goggin was a retailer at the time he sold tangible personal property to the Milton J. Wershow Company. George T. Goggin was concededly a retailer while conducting the business operations of the Columbia Stamping and Manufacturing Corporation, and under the California statutes and the holdings of the California cases he did not cease to be a retailer when he liquidated the business of the bankrupt.

Since the Milton J. Wershow Company purchased tangible personal property from a retailer for use in this state and used the property here, the Company is liable for the use tax under the express language of section 6201 of the California Revenue and Taxation Code.

V. To Require George T. Goggin to Collect the Use Tax from the Milton J. Wershow Company Would Not Interfere with the Performance of His Functions as a Trustee in Bankruptcy

On the basis of the foregoing discussion, we believe it is very clear that a person purchasing tangible personal property for use in this State from a trustee in bankruptcy liquidating the assets of a bankrupt estate is subject to the California use tax. It is then necessary to consider if the use tax is to be collected from the consumer by the trustee in bankruptcy or if the State will be required to collect the use tax from each purchaser individually. It is important to note that once it is recognized that the purchaser is liable for the use tax, it should be a matter of indifference to the purchaser whether he pays the use tax to the trustee in bankruptcy who transmits it to the State, or whether he makes payment directly to this State. In either case, the amount of tax which the purchaser pays will be the same, although it probably would be simpler from the purchaser's standpoint to pay the tax to the trustee at the same time he pays the purchase price. From the standpoint of the State, it is highly desirable to have retailers collect the use tax from purchasers and transmit the tax so collected to the State rather than have the State collect the tax directly from the purchasers, particularly when a retailer is making a great number of relatively small sales. It is therefore provided in the California Sales and Use Tax Law as follows:

“Every retailer maintaining a place of business in this State and making sales of tangible personal property for storage, use, or other consumption in this State, not exempted under Chapter 4 of this part, shall, at the time of making the sales, or if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage,

use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board." (California Revenue and Taxation Code, sec. 6203)

The retailer, when he collects the tax from the consumer, is, of course, obligated to pay the sum to the State.

It should be noted that a California retailer who, prior to collecting the use tax from the purchaser, transmits use tax to this State on behalf of the purchaser has a cause of action against the purchaser since, under the California statutes, the purchaser is primarily liable for the payment of the use tax. *Brandtjen & Kluge v. Fincher*, 44 Cal. App. 2d 939, 111 P.2d 979.

In the preceding sections of this brief, it has been shown that George T. Goggin was a retailer while conducting the affairs of Columbia Stamping and Manufacturing Corporation, including the liquidation of its assets. He was admittedly maintaining a place of business in this State while supervising the affairs of the bankrupt. Under the provisions of the California Sales and Use Tax Law set forth above he should, therefore, have collected use tax on the sale here involved and transmitted it to the State of California. In the discussion which follows, we shall show that there are no constitutional inhibitions which prevent his complying with the provisions of the California statute.

The constitutionality of the California statutory provision requiring the retailer to collect use tax from the purchaser has been upheld by the United States Supreme Court in *Felt & Tarrant v. Gallagher*, 306 U.S. 62, 59 Sup. Ct. 376. In the *Felt & Tarrant* case, goods were shipped into California in interstate commerce with title passing to the purchaser outside of California. It was contended by the

retailer, Felt & Tarrant Company, that requiring it to collect the California use tax from the purchaser on goods sold in interstate commerce would constitute an interference with such commerce in violation of the federal constitution. This argument was rejected by the United States Supreme Court. The holding of the *Felt & Tarrant* case was reaffirmed in *General Trading Company v. Tax Commission*, 322 U.S. 335, 64 Sup. Ct. 1028. In *General Trading Co. v. Tax Comm'n*, *supra*, the Supreme Court upheld the provisions of the Iowa use tax as applied to goods purchased from the General Trading Company, a Minnesota corporation, which shipped its merchandise from Minnesota to residents of Iowa for consumption in the latter state. In upholding the requirement that the use tax was to be collected from the purchasers by the Minnesota corporation, the Court said:

“* * * The tax is what it professes to be—a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device. *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 93-94; *Felt & Tarrant Co. v. Gallagher*, *supra*.” (322 US 335, at 338, 64 Sup. Ct. 1028, at 1029)

It should be noted that in *McLeod v. Dilworth Co.*, 322 U.S. 327, 64 Sup. Ct. 1023 which was decided the same day as the *General Trading Company* case an Arkansas sales tax imposed on vendors conducting their selling operations in the same manner as the *General Trading Company* was held invalid as violative of the commerce clause of the

United States Constitution. It is thus apparent that the State of California can require a retailer to collect use tax from its customers and remit it to the State even under circumstances in which the State could not constitutionally impose a sales tax on the retailer.

The United States Supreme Court has recognized that it is appropriate for a federal instrumentality to be required to collect a tax imposed on its customers even though there are constitutional inhibitions against the imposition of the tax on the instrumentality itself (*Colorado National Bank v. Bedford*, 310 U.S. 41, 60 Sup. Ct. 800). The *Colorado National Bank* case presented the following question: Could the State of Colorado require a national bank to collect from its customers a two percent tax measured by the bank's charges for the safe deposit service provided by the bank and to transmit the tax to the State when the State could not constitutionally impose such a tax on the bank itself. In upholding the validity of the tax, the Supreme Court said:

"* * * The funds which were received by the State came from the assets of the user, not from those of the federal instrumentality, the bank. The Colorado Supreme Court holds the user is the taxpayer. The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling. As the user directly furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but by section 12 of the act as the responsible obligor, we conclude the tax is upon him, not upon the bank. The constitution or laws of the United States do not forbid such a tax.

The tax being a permissible tax on customers of the bank, it is settled by our prior decisions that the statutory provisions requiring collection and remission of the taxes do not impose an unconstitutional burden on

a federal instrumentality. * * *” (310 US 41 at 52, 60 Sup. Ct. 800, at 805. Footnotes omitted; emphasis added)

The principle of *Colorado National Bank v. Bedford*, 310 U.S. 41, 60 Sup. Ct. 800, would clearly apply in the instant case. As the prior discussion has shown it is established by the terms of the California statute, the decisions of the California courts (*Chicago Bridge and Iron Co. v. Johnson*, 15 Cal. 2d 162, 119 P.2d 945) and the decisions of the United States Supreme Court (*Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 59 Sup. Ct. 389) that the California Use Tax is imposed on the purchaser rather than the vendor. Therefore, under the principle of the *Colorado National Bank* case, *supra*, a trustee in bankruptcy, who is also a retailer maintaining a place of business in this State, may be required to collect the California use tax from purchasers.

Direct support for this conclusion is found in *City of New York v. Jersawit*, 85 F.2d 25 (Second Circuit), which is discussed earlier in this brief. In the *Jersawit* case it was expressly held that a trustee in bankruptcy, liquidating the assets of the bankrupt, was required to collect the New York City sales tax, the legal incidence of which is on the purchaser, since the collection of the tax would not interfere with the performance of the trustee's functions in liquidating the assets of the bankrupt estate. The Court said:

“* * * Not only would the tax be on the purchaser rather than on the trustee, but it would be equivalent to that imposed on all persons in the community similarly situated. It is the policy of the courts ordinarily to treat such general taxes as valid. * * *” (85 F.2d 25 at 27)

If, as the court held in *New York City v. Jersawit*, *supra*, the collection by the trustee in bankruptcy of the New York

City sales tax from a purchaser would not constitute an interference with the performance of the duties of a trustee in bankruptcy liquidating the assets of a bankrupt estate, it would certainly follow that the collection by a trustee in bankruptcy of the California use tax would not constitute such an interference. This is so since the purchaser's liability for the payment of the tax involved in the *Jersawit* case arose by virtue of the sale and was associated with the trustee's act of selling. The California use tax, on the other hand, involves a tax liability imposed not on the sale of the goods, but because of the use of the goods by the purchaser after he has acquired them.

The effect of the imposition of the California Use Tax in this case is merely to require the purchaser from a trustee in bankruptcy who uses the property he purchased in this State to bear the same burdens as any other person acquiring similar property for use in this State. The collection of use tax by the trustee will not interfere with the trustee's ability to dispose of the assets of the bankrupt estate since the purchaser will be required to pay the same amount of use tax regardless of whether the tax is collected from him by the trustee in bankruptcy or directly by the State of California. Since it would not interfere with the performance of his functions as a trustee in bankruptcy to collect the use tax from the purchaser and remit it to this State, the appellee, George T. Goggin, should have collected use tax from the Milton J. Wershow Company on the tangible personal property which he sold that Company for use in this State. For this reason, the order of the referee in bankruptcy confirmed by the District Court, enjoining the State of California and the State Board of Equalization from enforcing the use tax provisions of the California Sales and Use Tax Law with respect to this matter, was obviously erroneous.

CONCLUSION

On the basis of the foregoing discussion, it is clear that the bankruptcy court exceeded its jurisdiction in attempting to enjoin the State of California, and the California State Board of Equalization from collecting the use tax from the Milton J. Wershow Company. The Milton J. Wershow Company was liable for the use tax by virtue of exercising the privilege of using tangible personal property in this State. Moreover, the use tax on this transaction should have been collected by the appellee, George T. Goggin, and transmitted to this State. It is respectfully submitted that this case should be reversed and remanded with instructions to the District Court that the order of the referee in bankruptcy be set aside and that the appellant, California State Board of Equalization, be permitted to enforce the provisions of the California Use Tax law with respect to the transaction here involved.

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No. 14917.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee of the Estate of Columbia
Stamping and Manufacturing Corporation, Bankrupt,

Appellee.

BRIEF OF APPELLEE.

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TOPICAL INDEX

| | PAGE |
|--|-----------|
| Statement of the case..... | 1 |
| Summary of argument..... | 2 |
| Argument | 3 |
| A. The Bankruptcy Court had jurisdiction to determine whether any liability or duty under the use tax existed on part of the trustee in bankruptcy, arising from the sale in liquidation, and whether any injunctive relief should be granted..... | 3 |
| B. The Bankruptcy Court properly decided that the trustee had neither liability for any tax or debt under the Use Tax Law nor any duty to collect such tax or debt..... | 5 |
| (1) A trustee in bankruptcy is not a "retailer" when he makes a liquidation sale..... | 5 |
| (2) Liability under the Use Tax Law is based upon acquisition from a "retailer"..... | 7 |
| (3) Liability under the Use Tax Law is exempted if for constitutional reasons no sales tax could have been assessed | 7 |
| (4) Liability under the Use Tax Law is exempted in respect to property purchased from any unincorporated agency or instrumentality of the United States (with exceptions not material)..... | 9 |
| (5) A requirement to pay or collect any tax or debt based on the Use Tax Law would constitute an interference with bankruptcy administration..... | 9 |
| (6) The property involved is exempt as an "occasional" sale | 11 |
| Conclusion | 12 |
| Appendices : | |
| Appendix "A." Memorandum Opinion of the United States District Court | App. p. 1 |
| Appendix "B." Cited sections of Revenue Laws or California | App. p. 2 |

TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|--|----------------|
| Atchison, Topeka & Santa Fe Railway Company v. State Board of Equalization, 139 A. C. A. 447, 294 P. 2d 181..... | 11 |
| California State Board of Equalization v. Goggin, 191 F. 2d 726..... | 3, 5, 8, 9, 10 |
| Central States v. Luther, 215 F. 2d 38..... | 3 |
| Evarts v. Eloy Gin, 204 F. 2d 712..... | 3 |
| Market Street Railway Company v. California Board of Equalization, 137 A. C. A. 100, 290 P. 2d (.....) | 6 |
| McColgan v. Maier Brewing Co., 134 F. 2d 385, 53 Am. B. R. (N. S.) 90..... | 4 |
| Reconstruction Finance Corporation v. Riverview State Bank, 217 F. 2d 455..... | 3 |
| State Board of Equalization v. Boteler, 131 F. 2d 386..... | 5 |
| Sutter Packing Company v. California Board of Equalization, 139 A. C. A. 983, 294 P. 2d 1083..... | 6 |

STATUTES

| | |
|--|-------------|
| Bankruptcy Act, Sec. 33..... | 9 |
| Bankruptcy Act, Sec. 62a..... | 4 |
| Revenue and Taxation Code, Secs. 6001-7176 | 8 |
| Revenue and Taxation Code, Sec. 6005.5(a)..... | 11 |
| Revenue and Taxation Code, Sec. 6201 | 5, 7 |
| Revenue and Taxation Code, Sec. 6202..... | 7 |
| Revenue and Taxation Code, Sec. 6203 | 4, 7, 9, 10 |
| Revenue and Taxation Code, Sec. 6204..... | 4, 7, 10 |
| Revenue and Taxation Code, Sec. 6244..... | 10 |
| Revenue and Taxation Code, Secs. 6351-6421 | 8 |
| Revenue and Taxation Code, Sec. 6352 | 7, 8 |
| Revenue and Taxation Code, Sec. 6367..... | 11 |
| Revenue and Taxation Code, Sec. 6402..... | 9 |

PAGE

| | |
|--|---|
| Revenue Laws of California (Anno. Ed., 1955), p. 302 (pub. by State Board of Equalization)..... | 6 |
| United States Code, Title 11, Sec. 61..... | 9 |
| United States Code Annotated, Title 11, Sec. 102(a)..... | 4 |
| United States Code Annotated, Title 28, Sec. 124a..... | 5 |
| United States Code Annotated, Title 28, Sec. 960..... | 5 |

TEXTBOOK

| | |
|---|----|
| 24 California Law Review, pp. 175, 176..... | 11 |
|---|----|

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BRIEF OF APPELLEE.

Statement of the Case.

The appellee accepts the appellant's statement of the case.

We note, however, that the opinion of the District Court was not inserted in the record and have placed same in Appendix "A" (p. 1).

Summary of Argument.

A. The Bankruptcy Court had jurisdiction *to determine* (1) whether any liability or duty under the Use Tax Law* existed on part of the Trustee in Bankruptcy, arising from the sale in liquidation, and (2) whether any injunctive relief should be granted.

B. The Bankruptcy Court properly decided that the Trustee had neither liability for any tax or debt under the Use Tax Law nor any duty to collect such tax or debt.

(1) A Trustee is not a “retailer” when he makes a liquidation sale.

(2) Liability under the Use Tax Law is based upon acquisition from a “retailer”.

(3) Liability under the Use Tax Law is exempted if for Constitutional reasons no sales tax could have been assessed.

(4) Liability under the Use Tax Law is exempted in respect to property purchased from any unincorporated agency or instrumentality of the United States (with exceptions not material).

(5) A requirement to pay or collect any tax or debt based on the Use Tax Law would constitute an interference with bankruptcy administration.

(6) The property involved is exempt as an “occasional” sale.

C. Conclusion.

*In Appendix “B” (p. 2) are all cited sections. Unless otherwise noted, all cited sections refer to Sale and Use Tax Law contained in California Revenue and Taxation Code, Section 6001 *et seq.*

ARGUMENT.

A. The Bankruptcy Court Had Jurisdiction to Determine Whether Any Liability or Duty Under the Use Tax Existed on Part of the Trustee in Bankruptcy, Arising From the Sale in Liquidation, and Whether Any Injunctive Relief Should Be Granted.

The question of the jurisdiction of the Bankruptcy Court *to determine* the liability and duty of the Trustee and the related rights of the State of California and to issue injunctive relief were clearly disposed of by this Honorable Court in *California State Board of Equalization v. Goggin*, 191 F. 2d 726. The instant case contains an additional feature not found in the cited case, *i. e.*, injunctive provisions relating to the purchaser, Milton J. Wershow Co. As will later appear, it is apparent that the failure to enjoin the appellant in that connection would leave at loose ends the administration of the bankruptcy estate and would be a continuing threat to prospective purchasers at all liquidation sales. The Bankruptcy Court has the right to protect its own officers (*Goggin* case, *supra*) and its own orders. Under some conditions, where it is impossible to administer completely the estate of the bankrupt without determining a controversy between third parties a Bankruptcy Court has jurisdiction to determine a dispute between third parties. (*Reconstruction Finance Corporation v. Riverview State Bank*, 217 F. 2d 455 and *Central States v. Luther*, 215 F. 2d 38.) See also *Matter of Evarts v. Eloy Gin*, 204 F. 2d 712 (9th Cir. 1953), where, however, it appeared that the controversy did not affect the administration of the bankruptcy proceeding.

If this Court should affirm the lower court without including the injunctive relief concerning the purchaser, the

State would nevertheless proceed against the purchaser in face of a holding by the Bankruptcy Court that no Use Tax Law liability arose from the liquidation sale. Many prospective purchasers would be deterred from purchasing at a liquidation sale.

The State contends that the Trustee should have collected a Use Tax (debt) arising because of Section 6204. Such a tax or debt would be an expense of administration and subject to the summary jurisdiction of the Bankruptcy Court. (See Sec. 62a of the *Bankruptcy Act*, 11 U. S. C. A. 102(a); and *McColgan v. Maier Brewing Co.* (9th Cir.), 134 F. 2d 385, 53 Am. B. R. (N. S.) 90.)

In order for the Bankruptcy Court to determine that no liability existed against the Trustee, that Court necessarily would be required to determine that no use tax could be imposed at all, whatever might be the reason for its ruling, whether on constitutional grounds, or that "retailer" did not include a liquidating Trustee.

Whether a use tax or debt was proper would determine the amount of money which the Trustee should collect from the purchaser. (See Sec. 6203.)

It would seem that for the Court to make a complete determination, the necessary parties would be the State, the Trustee, and the purchaser in which event the Court's order would bind all parties.

If separate proceedings were taken, two parties at a time, the Bankruptcy Court might determine in a proceeding between only the State and the Trustee that the use tax was payable, in which event the Trustee would be required to pay "the debt." If the Trustee then proceeded against the purchaser only, it might be determined that no use tax was payable.

Obviously all three parties are necessary for a proper adjudication of the rights of each, from which it must follow that the injunctive relief affecting the purchaser was properly granted.

B. The Bankruptcy Court Properly Decided That the Trustee Had Neither Liability for Any Tax or Debt Under the Use Tax Law Nor Any Duty to Collect Such Tax or Debt.

(1) A Trustee in Bankruptcy Is Not a "Retailer" When He Makes a Liquidation Sale.

Section 6201 imposes the tax on the use of personal property purchased *from any retailer*.

It follows that if the Trustee was not a "retailer", no liability existed against anyone, either the Trustee or his vendee.

This Court in the *Goggin* case, *supra*, has positively held that even though the Trustee had been operating a business previously he was not subject to sales taxes based on liquidation sales of personal property pursuant to Court order. The State contended, as here, that the Trustee was a "retailer" and subject to sales taxes because he had previously operated the business and was subject to the provisions of Title 28 U. S. C. A. 960 (formerly Title 28 U. S. C. A. 124a). The Court applied its previous rulings in *State Board of Equalization v. Boteler* (1932), 131 F. 2d 386, in which it had stated that a Trustee while liquidating property was not a "retailer."

Of necessity the ruling in the *Goggin* case was based on either or both of two propositions:

(1) That the term "retailer" as used in the sales and Use Tax Act did not include a Trustee in Bankruptcy *while making liquidation sales*, or

(2) If the term "retailer" did include a Trustee in Bankruptcy while making liquidating sales, such inclusion was unconstitutional to the extent that it affected such liquidating sales.

In either event a Trustee would not be a "retailer."

In passing may it be noted that the State Board of Equalization in its own annotated edition of Revenue Laws of California (1955) at page 302 makes the following interpretation of a Trustee's status as a "retailer" in respect to liquidation sales.

"Trustee in Bankruptcy as 'retailer'.—A Trustee in bankruptcy who is selling the physical equipment of the bankrupt business, but is not conducting or continuing such business, is not a 'retailer', and is not subject to payment of sales tax upon sales made by him in liquidation of the assets of the bankrupt estate. State Board of Equalization v. Boteler, 131 Fed. 2d 386; California State Board of Equalization v. Goggin, 191 Fed. 2d 726, cert. den., 342 U. S. 909."

The cases cited by appellant, including *Market Street Railway Company v. California Board of Equalization*, 137 A. C. A. 100, 290 P. 2d, and *Sutter Packing Company v. California Board of Equalization*, 139 A. C. A. 983, 294 P. 2d 1083, do not involve the status of a Trustee in Bankruptcy while liquidating assets pursuant to order of the Bankruptcy Court. It might just as well be argued that a Sheriff on execution sale is liable to such taxes.

(2) Liability Under the Use Tax Law Is Based Upon Acquisition From a "Retailer."

An examination of the Sales and Use Tax Law as well as the arguments set forth by the appellant will disclose that before any liability can arise the property involved must have been acquired from a "retailer". Following are extracts from certain sections of the Sales and Use Tax Law:

Section 6201:

"An excise tax is hereby imposed on the . . . use . . . of . . . property purchased *from any retailer.*"

Section 6202:

"every person . . . using . . . property *purchased from a retailer* is liable for the tax."

Section 6203:

"*Every retailer* . . . making sales of . . . property for . . . use . . . , not exempted under Chapter 4 of this part, shall, . . . collect the tax from the purchaser . . ."

Section 6204:

"The tax required to be collected by the *retailer* constitutes a debt owed by the *retailer to this State.*"

(3) Liability Under the Use Tax Law Is Exempted if for Constitutional Reasons no Sales Tax Could Have Been Assessed.

Section 6352 reads:

"There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use or other consumption in this State

of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the constitution of this State.”

The *Goggin* case, *supra*, clearly indicates that a taxation of liquidation sales by a Trustee would be unconstitutional. The foregoing section expressly provides that any taxes imposed by the Sales and Use Tax Law are exempted if the State is prohibited under the Constitution, or laws of the United States, from imposing either a sales tax or a use tax in connection therewith.

Under the *Goggin* case, the State is prohibited on Constitutional grounds from imposing a sales tax on the property liquidated by the Trustee. Therefore, no *use tax* can be imposed by the State against either the Trustee or the purchaser.

The foregoing becomes clear when it is observed that “this part” (in Sec. 6352) is the entire Sales and Use Tax Law (Secs. 6001-7176); that the exemptions feature of the law are contained in Chapter 4 (Secs. 6351-6421); and that Chapter 4 is divided into four (4) articles:

Article 1 (Secs. 6351-6368) entitled General Exemptions, which applies to *both* sales tax and use tax;

Article 2 (Secs. 6381-6387) entitled Exemption From Sales Tax, which applies merely to Sales Tax;

Article 3 (Secs. 6401-6403) entitled Exemption From Use Tax, which applies merely to Use Tax; and

Article 4 (Sec. 6421) entitled Exemption Certificates, which applies merely to Sales Tax.

(4) **Liability Under the Use Tax Law Is Exempted in Respect to Property Purchased From Any Unincorporated Agency or Instrumentality of the United States (With Exceptions Not Material).**

Provision for this exemption is made in Section 6402 which reads:

“The . . . use . . . of property purchased from any unincorporated agency or instrumentality of the United States . . . is exempted from the use tax.”

We have found no cases discussing the above section, but do raise the point that the Trustee is an arm of the United States District Court and one whose office is created by Section 33 of the Bankruptcy Act, *11 U. S. C. A. 61*, which reads:

“The offices of Referee and Trustee are created.”

(5) **A Requirement to Pay or Collect Any Tax or Debt Based on the Use Tax Law Would Constitute an Interference With Bankruptcy Administration.**

The *Goggin* case, *supra*, has already indicated that the imposition of a sales tax would constitute an interference with bankruptcy administration.

Pertinent sections of the Sales and Use Tax Law read as follows:

Section 6203:

“Retailer making sales of property, ‘not exempted under Chapter 4 of this part’ shall at time of making sale . . . or at time the storage, use or other consumption becomes taxable, collect the tax from the purchaser”

Section 6204:

“The tax required to be collected by the retailer constitutes a *debt* owed by the retailer to this State.”

Section 6244:

“If the purchaser who gives a certificate makes any storage or use of the property other than retention, demonstration or display, while holding it for sale in the regular course of business, the storage or use is taxable as of the date the property is first sold, stored, or used”

One effect of the above sections is that if the Trustee should sell the property to a purchaser for resale, the Trustee then would not be obliged to collect a use tax. However, if at some later time the purchaser should “use” the property, then a liability would be chargeable to the Trustee. The result would be that the Trustee would be obliged to keep an estate open for an indefinite period to ascertain whether a purchaser apparently immune of tax under Section 6203, had decided to use the property, thus creating a liability against the Trustee under Section 6244.

Language in the *Goggin* case, *supra*, to the following effect

“A tax on this taxation, whatever form it takes, is a tax on the process of the Court liquidating assets in accordance with Constitutional power. In another aspect, it may be considered as a license fee required of a Federal officer to make liquidation. In either event it is void But no State is empowered to levy taxes upon the process of the Courts of the United States or to impede the officers of Court in an essential judicial function.”

is brought into focus by language in the *Atcheson, Topeka & Santa Fe Railway Company v. State Board of Equalization*, 139 A. C. A. 447 at 457, 294 P. 2d 181, where the Court with approval quotes Justice Traynor's *article in 24 California Law Review*, 175, 176:

"It is the intent of the Use Tax merely to supplement the Sales Tax by imposing upon those subject to it a tax burden equivalent to that of the Sales Tax with the same specific exemptions in each case."

(6) The Property Involved Is Exempt as an "Occasional" Sale.

Pertinent sections are 6006.5(a):

"A sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit, provided such sale is not one of a series of sales, sufficient in number, scope, and character to constitute an activity requiring the holding of a seller's permit."

Section 6367:

"There are exempted from the taxes imposed by this part the gross receipts from occasional sales of tangible personal property and the storage, use or other consumption in this State of tangible personal property, the transfer of which to the purchaser is an occasional sale."

The *Goggin* case, *supra*, has held that the Trustee was not required to hold a seller's permit in order to carry on a liquidating sale which would mean that the instant sale was an occasional sale and that it is exempted therefore from use tax under Section 6367.

Conclusion.

We believe that it has been established that a liquidation sale by a Trustee in Bankruptcy is not subject to sales taxes and, therefore, is not subject to use taxes or debt, not only by the definition and conditions contained in the Sales and Use Tax Law itself, but also that any effort by the State to impose a Use Tax impedes the administration of the Bankruptcy Court and to that extent is unconstitutional.

The orders of the lower Courts should be affirmed.

Respectfully submitted,

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APPENDIX "A".

In the District Court of the United States, Southern District of California, Central Division.

In the Matter of Columbia Stamping and Manufacturing Corporation, Bankrupt No. 44,605-BH. Neu-Bart Stamping & Mfg. Co., Bankrupt No. 44606-BH.

MEMORANDUM OPINION

In this review of two similar orders made by the late Referee in Bankruptcy, Hugh L. Dickson, entered on October 22, 1954, in the above two companion cases, the court is faced with the recurring problem of the State Board of Equalization of the State of California, in its persistent efforts to interfere and interject itself into the affairs of the Bankruptcy Court. This time the vehicle is the "sales and use tax law" of the State of California as amended in 1951. This amendment was an obvious attempt to overcome the ruling in California State Board of Equalization v. Goggin, 191 F. 2d 726, and in Re Davis Standard Bread, 46 F. Supp. 41, and affirmed in 131 F. 2d 386.

It is my view that it makes no difference whether you call it a "sales tax" or a "use tax" or any other name that may be applied. The nomenclature is immaterial, the effect is the same.

I feel this case is controlled by State Board of Equalization v. Goggin, 191 F. 2d 726, and I am bound by the rulings of our Circuit Court, notwithstanding an apparent contrary ruling in the case of City of New York v. Jersawit, CCA, 2, 85 F. 2d 25.

The court adopts the findings of fact and conclusions of law made by referees in each case and the orders under review are affirmed. The trustee is directed to prepare and submit proper order for my signature.

Dated: This 19th day of May, 1955.

BEN HARRISON,
Judge

APPENDIX "B".

Each of the following sections, 6006.5(a) to 6402 is found in Revenue Laws of California:

Section 6006.5(a): "OCCASIONAL SALE." "Occasional sale" includes:

(a) A sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit, provided such sale is not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit;

Section 6201: IMPOSITION AND RATE OF USE TAX.

An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this State at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter.

Section 6202: LIABILITY FOR TAX.

Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State except that a receipt from a retailer maintaining a place of business in this State or from a retailer who is authorized by the board under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this part relating to the use tax, regarded as a retailer maintaining a place of business in this State, given to the purchaser pursuant to Section 6203, is sufficient to

relieve the purchaser from further liability for the tax to which the receipt refers.

Section 6203: COLLECTION BY RETAILER.

Every retailer maintaining a place of business in this State and making sales of tangible personal property for storage, use or other consumption in this State, not exempted under Chapter 4 of this part, shall, at the time of making the sales or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

Section 6204: TAX AS DEBT.

The tax required to be collected by the retailer constitutes a debt owed by the retailer to this State.

Section 6241: PRESUMPTION OF PURCHASE FOR USE:
RESALE CERTIFICATE.

For the purpose of the proper administration of this part and to prevent evasion of the use tax and the duty to collect the use tax, it shall be presumed that tangible personal property sold by any person for delivery in this State is sold for storage, use, or other consumption in this State until the contrary is established. The burden of proving the contrary is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale.

Section 6242: EFFECT OF CERTIFICATE.

The certificate relieves the person selling the property from the burden of proof only if taken in good faith from a person who is engaged in the business of selling tangible

personal property and who holds the permit provided for by Article 2, Chapter 2, of this part and who, at the time of purchasing the tangible personal property, intends to sell it in the regular course of business or is unable to ascertain at the time of purchase whether the property will be sold or will be used for some other purpose.

Section 6244: LIABILITY OF PURCHASER.

If a purchaser who gives a certificate makes any storage or use of the property other than retention, demonstration or display while holding it for sale in the regular course of business, the storage or use is taxable as of the time the property is first so stored or used. If the sole use of the property, other than retention, demonstration, or display in the regular course of business, is the rental of the property while holding it for sale, the purchaser may elect to pay the tax on the use measured by the amount of the rental charged rather than the sales price of the property to him.

Section 6351: "EXEMPTED FROM THE TAXES IMPOSED BY THIS PART."

"Exempted from the taxes imposed by this part," as used in this article, means, in case of the sales tax, exempted from the computation of the amount of tax imposed.

Section 6352: CONSTITUTIONAL EXEMPTIONS.

There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State.

Section 6367: OCCASIONAL SALES.

There are exempted from the taxes imposed by this part the gross receipts from occasional sales of tangible personal property and the storage, use, or other consumption in this State of tangible personal property, the transfer of which to the purchaser is an occasional sale.

Section 6402: PROPERTY PURCHASED FROM UNITED STATES.

The storage, use or other consumption in this State of property purchased from any unincorporated agency or instrumentality of the United States, except (a) any property reported to the Surplus Property Board of the United States, or to any agency succeeding to the functions of that board, as surplus property by any owning agency and (b) any property included in any contractor inventory, is exempted from the use tax.

“Surplus property,” “owning agency,” and “contractor inventory” as used in this section have the meanings ascribed to them in that act of Congress of the United States known as the Surplus Property Act of 1944.

Title 28 U.S.C.A. 960 (formerly Title 28, Sec. 124a):

Section 960: TAX LIABILITY.

Any officers and agents conducting any business under authority of a United States Court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation. June 25, 1948, c.646, 62 Stat. 927.

No. 14,917

In the

United States Court of Appeals

For the Ninth Circuit

CALIFORNIA STATE BOARD OF EQUALIZATION,
Appellant,

VS.

GEORGE T. GOGGIN, Trustee of the Estate
of Columbia Stamping and Manufactur-
ing Corporation, Bankrupt,
Appellee.

Appellant's Reply Brief

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TOPICAL INDEX

| | Page |
|--|------|
| I Introductory Statement | 1 |
| II The Bankruptcy Court Has No Jurisdiction to Enjoin the State of California from Collecting a Use Tax Directly from Persons Using Property Purchased from a Trustee in Bankruptcy | 2 |
| III A Trustee in Bankruptcy Who Has Become a Retailer by Virtue of Making a Series of Retail Sales Does Not Cease to Be a Retailer When He Liquidates the Assets of the Bankrupt Estate | 4 |
| IV The Milton J. Wershow Company Is Subject to the Use Tax Because of its Storage and Use of Tangible Personal Property in California. The Purchase of This Property Does Not Satisfy the Requirements of Any of the Exemptions from the California Use Tax..... | 7 |
| A. The exemption from use tax contained in Section 6352 of the California Revenue and Taxation Code is confined to situations in which this State cannot constitutionally impose the use tax..... | 7 |
| B. Section 6402 of the Revenue and Taxation Code does not exempt from the use tax property purchased from a trustee in bankruptcy..... | 10 |
| C. The sale here involved was not exempt as an occasional sale within the meaning of the California Sales and Use Tax Law..... | 13 |
| V To Require George T. Goggin to Collect the Use Tax from the Milton J. Wershow Company Would Not Interfere with the Performance of His Functions as a Trustee in Bankruptcy | 15 |
| Conclusion | 17 |

TABLE OF AUTHORITIES CITED

| CASES | Pages |
|--|------------------------|
| California State Board of Equalization v. Goggin, 191 Fed. 2d 726 | 4, 5, 6, 7, 13, 15, 16 |
| Central States v. Luther, 215 Fed. 2d 38..... | 2 |
| Chicago Bridge & Iron Co. v. Johnson, 19 Cal. 2d 162, 165; 119 P.2d 945, 947..... | 10 |
| Colorado National Bank v. Bedford, 310 U.S. 41, 60 S.Ct. 800.. | 16 |
| Cypress Lawn Cemetery Assn. v. San Francisco, 211 Cal. 387, 295 P.2d 813..... | 12 |
| Frates v. Oklahoma Tax Comm., 178 Okla. 189, 62 P.2d 514.... | 12 |
| Krull, In re, 295 Fed. 520, 521 (Dist. Ct., Eastern Dist., New York) | 2 |
| Market Street Railway Company v. State Board of Equalization, 137 A.C.A. 100, 290 Pac.2d 20..... | 5 |
| New York v. Jersawit, 85 Fed.2d 25 [Second Circuit]..... | 6, 15, 16 |
| Oak Park Cleaners and Dyers, In re, 125 Fed. 2d 420, 422 (Seventh Circuit) | 2 |
| Oklahoma Tax Commission v. Texas, 336 U.S. 342 at 353, 69 S.Ct. 561, 567 | 2 |
| Reconstruction Finance Corporation v. Riverview State Bank, 217 Fed. 2d 455..... | 2 |
| Sobey v. Molony, 40 Cal. App. 2d 381, 385, 104 P.2d 868, 870 | 9 |
| Southern California Jockey Club v. California, etc. Racing Board, 36 Cal. 2d 167, 173, 223 P.2d 1, 5..... | 9, 10 |
| Southern Pacific Company v. McColgan, 306 U.S. 167, 59 S. Ct. 389 | 10 |
| State Board of Equalization v. Boeteler, 131 Fed. 2d 386..... | 6, 7 |
| Sutter Packing Company v. California State Board of Equalization, 139 A.C.A. 983, 294 Pac.2d 1038 [Hearing den. by Sup. Ct.] | 5 |

STATUTES

Pages

| | |
|---|-------------|
| Calif. Admin. Code, Section 2014..... | 12 |
| California Revenue and Taxation Code : | |
| Section 6001, et seq | 4, 5 |
| Section 6005 | 13 |
| Section 6006 | 14 |
| Section 6006.5 | 13, 14, 15 |
| Section 6006.5(a) | 13, 14 |
| Section 6014 | 14 |
| Section 6015(a) | 14 |
| Section 6019 | 6 |
| Section 6203 | 16 |
| Section 6352 | 7, 8, 9, 10 |
| Section 6381 | 12 |
| Section 6402 | 10, 11 |
| Retail Sales Tax Act of 1933, Section 5(a)..... | 8, 9 |
| Use Tax Act of 1935, Section 4(b)..... | 8, 9 |

TEXTS

| | |
|---|----|
| "The California Use Tax," Justice Traynor, 24 Cal. L. Rev. 175 | 10 |
|---|----|

No. 14917

In the
United States Court of Appeals
For the Ninth Circuit

CALIFORNIA STATE BOARD OF EQUALIZATION,
Appellant,

vs.

GEORGE T. GOGGIN, Trustee of the Estate
of Columbia Stamping and Manufactur-
ing Corporation, Bankrupt,
Appellee.

Appellant's Reply Brief

I.

INTRODUCTORY STATEMENT

There is no factual dispute in this case since the appellee has accepted the statement of the case as set forth in Appellant's Opening Brief. The Brief of Appellee has failed to come to grips with the issues discussed in Appellant's Opening Brief, and, for the most part, does not undertake to discuss the cases cited therein. Moreover, the Brief of Appellee seeks to raise a number of issues which have no

relevance in the disposition of the case here involved. It will be shown in the discussion which follows that the arguments of appellee are without merit.

II.

THE BANKRUPTCY COURT HAS NO JURISDICTION TO ENJOIN THE STATE OF CALIFORNIA FROM COLLECTING A USE TAX DIRECTLY FROM PERSONS USING PROPERTY PURCHASED FROM A TRUSTEE IN BANKRUPTCY.

In Appellant's Opening Brief, at pages 13 to 15 inclusive, it was pointed out that in the instant case the bankruptcy court had exceeded its jurisdiction by attempting to enjoin the collection of the California use tax from the Milton J. Wershow Company, the purchaser of the personal property here involved, because of the Company's storage and use of the property in this State since the bankruptcy court had lost jurisdiction of the property nine months earlier when it ceased to be part of the bankrupt estate (*In re Oak Park Cleaners and Dyers*, 125 Fed. 2d 420, 422 (Seventh Circuit); *In re Krull*, 295 Fed. 520, 521 (Dist. Ct., Eastern Dist., New York); and see *Oklahoma Tax Commission v. Texas*, 336 U.S. 342 at 353, 69 S.Ct. 561, 567.).

In the Brief of Appellee, the cases relied on by appellant are neither cited nor discussed. Instead the appellee attempts to show that the power to enjoin the State of California from taxing the use of property which has ceased to be a part of the bankrupt estate is derived from the jurisdiction of the bankruptcy court to adjudicate the duties of the trustee with respect to the collection of the tax. To support this rather startling proposition, appellee relies on cases such as *Reconstruction Finance Corporation v. Riverview State Bank*, 217 Fed. 2d 455, and *Central States v. Luther*, 215 Fed. 2d 38, holding that a bankruptcy court may adjudicate the conflict-

ing rights of third parties to property if doing so is necessary in order to administer the bankrupt estate. These cases have no application in the instant case, however, since not only are we not here concerned with the conflicting property rights of third parties, but in addition, it clearly is not necessary in order for the trustee to administer the estate of the bankrupt, that the State be enjoined from collecting a use tax from the Milton J. Wershow Company. As pointed out at pages 9, *et seq.* of Appellant's Opening Brief, the California use tax is imposed on the purchaser for the privilege of using tangible personal property in this State. Therefore, if the State collects the tax directly from the purchaser, the liability for the tax will be discharged and the administration of the bankrupt estate will not be affected in any manner whatsoever. It follows that the administration of the bankrupt estate does not require that the State be barred from collecting from persons who are not parties to the bankruptcy proceedings, use taxes imposed for the privilege of using property after it has ceased to be a part of the bankrupt estate.

Under the reasoning advanced by appellee, a bankruptcy court would have jurisdiction to enjoin the collection of all taxes arising after property ceased to be part of a bankrupt estate, including real and personal property taxes, since the bankruptcy court would have jurisdiction to determine the liability, if any, of the trustee for the collection of such taxes. It is respectfully submitted that this is not the law, and that in the instant case the bankruptcy court was without jurisdiction to enjoin the State of California from collecting a use tax from the Milton J. Wershow Company because of that Company's use in this State of tangible personal property purchased from George T. Goggin, the appellee.

III.

**A TRUSTEE IN BANKRUPTCY WHO HAS BECOME A RETAILER
BY VIRTUE OF MAKING A SERIES OF RETAIL SALES DOES
NOT CEASE TO BE A RETAILER WHEN HE LIQUIDATES THE
ASSETS OF THE BANKRUPT ESTATE.**

The California use tax is imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer (Revenue and Taxation Code, Section 6201 *et seq.*). Although there is no dispute between the parties that in the period in which the appellee, George T. Goggin, was operating the business of the Columbia Stamping and Manufacturing Corporation, he was a retailer by virtue of making numerous retail sales of personal property, appellee contends that he was not a "retailer" at the time he made the sale here in controversy since this was a sale in liquidation. Appellee states that *California State Board of Equalization v. Goggin*, 191 Fed.2d 726, so holds.

The arguments which appellee seeks to base on the decision of this Court in *California State Board of Equalization v. Goggin*, *supra*, are fatally defective because appellee overlooks the fact that the decision of this Court as to the meaning of the term "retailer" was based on an interpretation of California law which subsequent decisions of the California courts have shown to be incorrect. In addition, the question of unconstitutionality with which this Court was concerned in the *Goggin* case related to the imposition of a tax on a trustee in bankruptcy, liquidating the assets of an estate, and is not presented in this case involving as it does the taxation of a private person who was not a party to the bankruptcy proceeding.

This Court, in its opinion in *California State Board of Equalization v. Goggin*, *supra*, stated initially:

"The construction of the California tax is a matter of state law which is binding upon us." (191 F.2d 726, at 729)

The opinion then reviewed the decisions of the California appellate courts in an effort to determine whether a retailer is "engaged in business" within the meaning of the California Sales and Use Tax Law when he is liquidating his business assets. At the time the *Goggin* case was decided this matter had not been passed upon directly by the California courts. This Court concluded, however, that the existing California precedents seemed to indicate that under California law a retailer who begins to liquidate his business ceases to be "engaged in business" and, therefore, is not a retailer with respect to the business assets he is liquidating. Two opinions of the California courts which were issued subsequent to the decision in *California State Board of Equalization v. Goggin, supra*, reach a contrary conclusion and squarely hold that a retailer who is liquidating his business assets is "engaged in business" within the meaning of the Sales and Use Tax Law and, therefore, he retains his status as a retailer with respect to the assets which he is liquidating (*Market Street Railway Company v. State Board of Equalization*, 137 A.C.A. 100, 290 Pac.2d 20, and *Sutter Packing Company v. California State Board of Equalization*, 139 A.C.A. 983, 294 Pac.2d 1083 [Hearing denied by the Supreme Court of California]). These cases are more fully discussed at pages 17 through 20 inclusive of Appellant's Opening Brief, where it is pointed out that the California courts considered and rejected arguments by the taxpayers that the decision of this court in *California State Board of Equalization v. Goggin*, 191 Fed.2d 726 should be followed. Appellee has apparently failed to appreciate the significance of the decisions in the *Sutter Packing Company* and *Market Street Railway* cases, *supra*, since he attempts to brush them aside on the ground that they are not relevant to the problem presented by this case.

Moreover, the constitutional considerations involved in *California State Board of Equalization v. Goggin, supra*, are not presented in this case. In reaching its decision in the Goggin case, this Court was concerned with avoiding a construction of the California law which would render the California statute unconstitutional. This Court apparently concluded that an interpretation of the Sales and Use Tax Law which would result in the imposition of a sales tax on a trustee in bankruptcy liquidating the assets of a bankrupt estate would constitute such an interference with the performance of the trustee's duties as to render the California statute unconstitutional. Appellee has failed to note that no such constitutional considerations are presented in this case since we are here concerned with a use tax imposed on the purchaser and not with a sales tax imposed on a liquidating trustee. Since the imposition of a tax on the purchaser, does not interfere with the bankruptcy trustee's performance of his duties in liquidating an estate (*New York v. Jersawit*, 85 Fed.2d 25 [Second Circuit]), there are no constitutional inhibitions against regarding a trustee in bankruptcy as a retailer in the instant case.

It is to be noted that appellee has failed to discuss the additional definition of retailer found in Section 6019 of the California Revenue and Taxation Code, enacted in 1951, which was not in effect in the period involved in *California State Board of Equalization v. Goggin, supra*. Section 6019 expressly provides that a trustee in bankruptcy making more than two retail sales in any twelve month period is a retailer.

Appellee attempts to derive some comfort from the fact that since 1943 there has appeared in the Revenue Laws of California, published by the State Board of Equalization, an annotation which summarizes the holding in *State Board*

of *Equalization v. Boeteler*, 131 Fed. 2d 386, and that some years later a citation to *State Board of Equalization v. Goggin*, *supra*, was included without comment in that publication under the heading "Trustee in Bankruptcy as 'retailer'." Since the position of the Board of Equalization with respect to the status of a trustee in bankruptcy as a retailer is clearly set forth in Appellant's Opening Brief, and since this Court is obviously not concerned with how an employee of the Board of Equalization may have summarized the holding in the *Boeteler* case, *supra*, the annotation referred to by appellee is completely irrelevant in this proceeding.

IV.

THE MILTON J. WERSHOW COMPANY IS SUBJECT TO THE USE TAX BECAUSE OF ITS STORAGE AND USE OF TANGIBLE PERSONAL PROPERTY IN CALIFORNIA. THE PURCHASE OF THIS PROPERTY DOES NOT SATISFY THE REQUIREMENTS OF ANY OF THE EXEMPTIONS FROM THE CALIFORNIA USE TAX.

A. The Exemption from Use Tax Contained in Section 6352 of the California Revenue and Taxation Code is Confined to Situations in Which This State Cannot Constitutionally Impose the Use Tax.

Section 6352 of the California Revenue and Taxation Code provides in essence that the California sales tax is not applicable in situations in which the imposition of a sales tax would violate the state or federal constitution and, in like manner, that the California use tax is not applicable in situations in which the imposition of a use tax would violate the state or federal constitution. Appellee asserts, however, that Section 6352 is intended to exempt from the use tax all transactions to which the sales tax may not be constitutionally applied. Not only does this suggested construction of the section find no support in its language, but it completely ignores the legislative history of Section 6352,

which resolves all doubt as to the fallacy of appellee's position. Moreover, as will be subsequently shown, the construction suggested by appellee would result in the virtual elimination of the California use tax which was enacted for the very purpose of taxing transactions to which the sales tax could not be constitutionally applied.

Section 6352 is merely a codification of parallel provisions which were contained in the Retail Sales Tax Act of 1933, and the Use Tax Act of 1935. Section 5(a) of the Retail Sales Tax Act provided a sales tax exemption for:

"The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

Section 4(b) of the Use Tax Act provided:

"Sec. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

* * * * *

(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

By California Stats. 1941, Ch. 36, p. 532, the Legislature adopted as Division 2, part 1 of the Revenue and Taxation Code the codification of the Retail Sales Tax Act and of the Use Tax Act which together were to be known as the California Sales and Use Tax Law. The codification was to be effective July 1, 1943. This codification combined the two exemptions referred to above in Section 6352 which provides as follows:

“There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale of which, or the storage, use or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State.” (Emphasis added.)

It is to be noted that the italicized portion of this section is almost identical in content with Section 4(b) of the Use Tax Act which is quoted above. The codification of the exemption formerly found in Section 5(a) of the Retail Sales Tax Act is also readily discernible. Moreover, any doubt that the Legislature, in adopting the codification, intended to continue the exemption from the use tax found in Section 4(b) of the Use Tax Act is removed by a consideration of the fact that at the 1941 session of the Legislature, in the process of amending various provisions of the Use Tax Act which was to remain in effect until the effective date of the codification, the Legislature re-enacted without change Section 4(b) of the Use Tax Act quoted above (Calif. Stats. 1941, ch. 247, sec. 16, p. 1335).

Moreover, the codification of this portion of the Revenue and Taxation Code was prepared by the California Code Commission. The Code Commission reported to the Governor and the Legislature that in preparing this codification it did not intend to make any substantive change in the law (California Code Commission, Final Report 1953, p. 12). In addition, in California, it is presumed that the codification of a statute is not intended to effect a substantive change in the law. *Sobey v. Molony*, 40 Cal. App. 2d 381, 385, 104 P.2d 868, 870; *Southern California Jockey Club v. California, etc. Racing Board*, 36 Cal. 2d 167, 173, 223 P.2d

1, 5). It is thus apparent that Section 6352 merely combined and codified the parallel exemptions contained in the two taxing acts and did not extend or enlarge the exemptions.

Appellee apparently does not recognize that if its contentions were correct, it would virtually eliminate the use tax which was designed for the very purpose of imposing a tax on purchasers under circumstances in which a sales tax on the seller would be barred for constitutional reasons; For example: if an automobile is purchased by a California resident from a dealer in Nevada, California could not constitutionally impose a sales tax on the Nevada dealer; but California does collect a use tax from the California purchaser. The very purpose of enacting the California use tax was to avoid discrimination against local suppliers by applying an equal tax burden on goods purchased outside of California (*Chicago Bridge & Iron Co. v. Johnson*, 19 Cal. 2d 162, 165; 119 P.2d 945, 947; *Southern Pacific Company v. McColgan*, 306 U.S. 167, 59 S.Ct. 389). The *Southern Pacific* case *supra*, upholds the application of the California use tax on the use in California of property constitutionally exempt from the sales tax. In its decision, the Court recognizes the purpose of the use tax in complementing the California sales tax. (See, also, "The California Use Tax" by Justice Traynor in 24 Cal. L. Rev. 175, discussing the application of the California use tax to sales constitutionally exempt from the California sales tax.)

B. Section 6402 of the Revenue and Taxation Code Does Not Exempt from the Use Tax Property Purchased from a Trustee in Bankruptcy.

Appellee suggests that the sale here involved may be exempt under Section 6402 of the Revenue and Taxation Code which provides:

"Property purchased from United States. The storage, use, or other consumption in this State of property purchased from any unincorporated agency or instrumentality of the United States, except (a) any property reported to the Surplus Property Board of the United States, or to any agency succeeding to the functions of that board, as surplus property by any owning agency and (b) any property included in any contractor inventory, is exempted from the use tax.

'Surplus property,' 'owning agency,' and 'contractor inventory' as used in this section have the meanings ascribed to them in that act of the Congress of the United States known as the 'Surplus Property Act of 1944.' "

This code section relates to the sale of property *owned* by the United States and its unincorporated agencies and instrumentalities as evidenced by the incorporation therein by reference of the definition of "owning agency" as set forth in the Surplus Property Act of 1944. Section 6402 was enacted to avoid, for purposes of administrative convenience, the imposition of a use tax on the purchase of publications and other minor items from departments of the federal government, such as the Department of Commerce, or the Department of Labor, since the cost of collecting a use tax thereon would far exceed the revenue produced. On the other hand, sales of surplus property and sales of property owned by incorporated agencies, such as the Reconstruction Finance Corporation, which generally were of sufficient magnitude to warrant the imposition of a use tax on the purchaser, were excluded from the exemption.

At the time of the enactment of Section 6402, there was in effect an administrative regulation of the Board of Equalization defining unincorporated instrumentalities of the

United States with respect to the exemption from the sales tax found in Section 6381 of the Revenue and Taxation Code which stated:

“* * * B. *Unincorporated Instrumentalities*. Tax does not apply to sales to the Departments of the United States such as the War and Navy Departments, and to the various unincorporated offices, agencies, and establishments of the government.” (Ruling 54, 18 Calif. Admin. Code Section 2014)

The Legislature, when it adopted Section 6402, was presumably aware of this administrative interpretation of the terms “agency” and “instrumentality” of the United States and intended to adopt the Board’s definition of these terms. It is obvious from this definition that the terms “agencies” and “instrumentalities” of the United States were intended to encompass established agencies and permanent organizations of the federal government, and were not intended to apply to a trustee appointed to administer private assets pursuant to the provisions of the bankruptcy act. (See *Frates v. Oklahoma Tax Comm.*, 178 Okla. 189, 62 P.2d 514, holding that a federal receiver is not a “federal instrumentality” for State tax purposes.)

It is apparent that Section 6402 does not apply to privately owned property sold by a trustee in bankruptcy. This section certainly did not contemplate that privately owned property which was purchased for use in this State was to be exempt from the use tax merely because it was purchased from a trustee in bankruptcy who was administering the assets of a private corporation for the benefit of its creditors. It is, of course, axiomatic that exemptions from taxation are to be strictly construed (*Cypress Lawn Cemetery Assn. v. San Francisco*, 211 Cal. 387, 295 P.2d 813).

It should be noted that in Section 6005 of the Revenue and Taxation Code which defines the term "Person", there is a separate reference to "trustee in Bankruptcy" and to "the United States" which demonstrates that the two terms are not used synonymously in the California Sales and Use Tax Law. It is obvious, moreover, that if the Legislature had intended to regard a trustee in bankruptcy as an agency or instrumentality of the United States and to grant an exemption to purchasers from a trustee, it would not have expressly included a trustee in bankruptcy within the definition of retailer which is found in Section 6019 of the California Revenue and Taxation Code.

C. The Sale Here Involved Was Not Exempt as an Occasional Sale Within the Meaning of the California Sales and Use Tax Law.

It is alleged by appellee that the sale here involved is exempt as an occasional sale within the meaning of Section 6006.5(a) of the Revenue and Taxation Code which provides:

" 'Occasional sale' includes:

(a) A sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit, provided such sale is not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit; * * *

Appellee asserts that since under the holding of *California State Board of Equalization v. Goggin*, 191 Fed. 2d 726, a seller's permit is not required by a trustee making liquidation sales, it follows that the sale here in controversy was exempt as an occasional sale. It is apparent that appellee has failed to analyze the language of Section 6006.5(a). This section excludes from the definition of

occasional sale, the sale of property used by a retailer* in making retail sales, an activity for which he is required to hold a seller's permit (Revenue and Taxation Code, Sec. 6066).

In 1947, shortly after the enactment of Section 6006.5, the Board of Equalization published Ruling 81 (18 Calif. Admin. Code, Section 2101) which points out that Section 6006.5(a) excludes from the definition of an "occasional sale" the sale by a retailer of property used in connection with his retail selling activity such as show cases, and office or delivery equipment. In other words, when a person has, by virtue of carrying on retail selling activities, become a retailer, the sale of that portion of his capital assets which is in the form of tangible personal property and which was used in connection with his retail selling activity, is not exempt from taxation as an "occasional sales" under Section 6006.5(a). Therefore, if a trustee in bankruptcy, who has become a retailer by virtue of making retail sales while operating the business of the bankrupt, sells assets which he used in connection with this retail selling activity, the transaction is not exempt from taxation as an occasional sale. It is immaterial under the terms of Section 6006.5(a) that the liquidation of the assets was not the type of activity which taken by itself would require the trustee in bankruptcy to obtain a seller's permit.

In the instant case, the property which was sold was held and used by George T. Goggin, the appellee, for a period of

*Under the California Sales and Use Tax Law, every retailer is a seller since a seller is defined in Section 6014 as follows:

“‘*Seller*’. ‘Seller’ includes every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax.”

And the term “retailer” is defined in Section 6015(a) as follows:

“‘*Retailer*’. ‘Retailer’ includes:

(a) Every seller who makes any retail sale or sales of tangible personal property, * * *

seven years in the course of conducting the affairs of the bankrupt. During this period the appellee was a retailer and this property was used in connection with an activity requiring the holding of a seller's permit, namely, the making of numerous retail sales of tangible personal property (Tr. 51, 52, 101). It follows that since the property here involved was "held or used" by the appellee in the course of an activity for which a seller's permit was required, its sale is not exempt as an occasional sale under the provisions of Section 6006.5.

V.

TO REQUIRE GEORGE T. GOGGIN TO COLLECT THE USE TAX FROM THE MILTON J. WERSHOW COMPANY WOULD NOT INTERFERE WITH THE PERFORMANCE OF HIS FUNCTIONS AS A TRUSTEE IN BANKRUPTCY.

At pages 22 through 27 inclusive of Appellant's Opening Brief, it is shown that the collection of the use tax by the appellee, George T. Goggin, would not interfere in any way with the performance of his functions as a trustee in bankruptcy. It is there pointed out that in *New York City v. Jersawit*, 85 Fed. 2d 25 (Second Circuit) it was expressly held that the collection by a trustee in bankruptcy, liquidating the assets of a bankrupt estate, of a tax on purchasers would not interfere with the performance of the trustee's official functions. The court in the *Jersawit* case distinguished this situation from one in which the tax is imposed, not on the purchaser, but on the liquidating trustee. In the latter situation, the court in the *Jersawit* case indicated that the tax would burden the trustee in performing his official functions. It is apparent, therefore, that the *Jersawit* case is completely consistent with the holding of this court in *California State Board of Equalization v.*

Goggin, 191 Fed. 2d 726. It was pointed out in Appellant's Opening Brief that direct support for appellant's contention is also furnished by *Colorado National Bank v. Bedford*, 310 U.S. 41, 60 S.Ct. 800, upholding the validity of a Colorado statute requiring the *collection* by national banks of a tax on depositors measured by the charges for the bank's safe deposit service although there were constitutional inhibitions against imposing the tax on the bank itself. Appellee has declined to discuss or even mention either *New York City v. Jersawit*, *supra*, or *Colorado National Bank v. Bedford*, *supra*, in its brief.

Appellee, in attempting to show that the collection of a use tax would interfere with the performance of the trustee's functions is forced to ignore the facts of the instant case and to assume a hypothetical situation in which the purchaser gave the trustee in bankruptcy a resale certificate and subsequently made use of the items purchased. Appellee asserts that a trustee would, under such circumstances, have to keep an estate open indefinitely in order to be able to collect the use tax. Of course, no such problem is presented in this case since no resale certificate was given by the purchaser and it is conceded by appellee that in the instant case the property here involved was purchased for use in California.

Moreover, the situation posed by appellee would not present any real problem to a trustee in bankruptcy since the appellant, Board of Equalization, has never contended, nor is it here contended that a bankrupt estate otherwise ready to close must be kept open for the purpose of ascertaining whether property not subject to the use tax at the time of sale was subsequently stored or used in this state in a manner which renders the purchaser liable for the use tax. Section 6203 of the Revenue and Taxation Code provides for the collection of a use tax by a "retailer maintaining a place

of business in this State." It is apparent that the reasonable interpretation of this provision (and the interpretation followed by the appellant) is that a retailer is only obligated to collect use tax from his vendees as long as the retailer is maintaining a place of business in this state. It is obvious that when a bankrupt estate is closed and the trustee discharged, his duties under Section 6203 come to an end.

In addition, it is the practice of the Board of Equalization to collect the tax from the purchaser and not the retailer if the retailer has taken a resale certificate in good faith and the purchaser then uses the property rather than reselling it.

CONCLUSION

It is respectfully submitted that the arguments of appellee are without merit and that, for the reasons set forth herein and in Appellant's Opening Brief, this case should be reversed and remanded with instructions to the District Court that the order of the referee in bankruptcy be set aside and that the appellant, California State Board of Equalization, be permitted to enforce the provisions of the California Use Tax Law with respect to the transaction here involved.

EDMUND G. BROWN

Attorney General of California

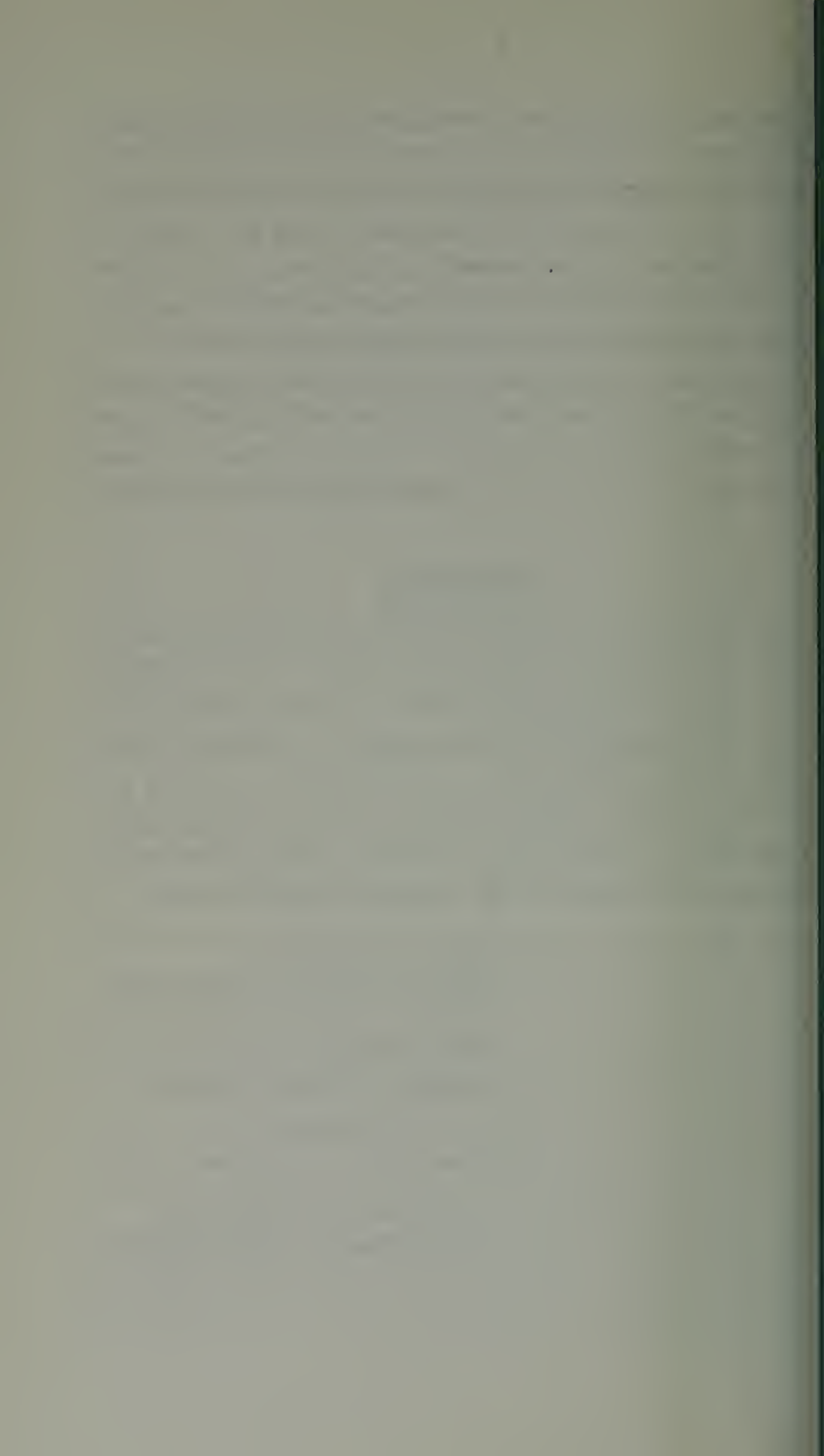
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No. 14,922

IN THE

United States Court of Appeals
For the Ninth Circuit

GEORGE DUSHON, HAROLD RATHGEB, HILTON
DUKE, PETER J. VALLENTINE, NELS PIL-
SKOG, JOE MISZENCIN and THOMAS J.
GOLDEN,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF OF APPELLANTS.

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Subject Index

| | |
|---|------|
| I. | Page |
| Jurisdictional statement | 1 |
| II. | |
| Statement of the case | 2 |
| A. Pleadings | 2 |
| B. The facts | 3 |
| III. | |
| Questions involved and how raised | 12 |
| IV. | |
| Specifications of error | 13 |
| 1. Errors in findings of fact | 13 |
| 2. Errors in conclusions of law | 14 |
| V. | |
| Argument | 15 |
| Right of control | 19 |
| VI. | |
| Conclusion | 34 |

Table of Authorities Cited

| Cases | Pages |
|---|--------------|
| American Pacific Whaling Company v. Kristensen, 93 Fed. (2d) 20 | 23 |
| Chicago B & I Railway Co. v. Willard, 220 U.S. 413..... | 16 |
| Denton v. Yazoo & M. V. R. Co., et al., 284 U.S. 305..... | 19, 23 |
| Doll & Sons v. Rebetti, 203 P. 593 | 23 |
| International-Great Northern R. Co. v. Lucas, 70 S.W. (2d) 226 | 23 |
| Jones v. Goodson, 121 P. (2d) 179 | 22 |
| Liberty Highway Co. v. Callahan, 157 N.E. 708 | 18 |
| Linman v. Murphy, 232 S.W. (2d) 937 | 23 |
| Matcovich v. Anglim, 134 Fed. (2d) 834 | 19, 33 |
| Midland Valley R. Co. v. Toomer, 162 P. 1127 | 16 |
| P. F. Collier & Son Distributing Corp. v. Drinkwater, 81 Fed. (2d) 202 | 21 |
| Standard Oil Co. v. Parkinson, 152 Fed. 681 | 21 |
| State of Maryland v. Manor Real Estate & Trust Co., et al., 176 Fed. (2d) 414 | 20, 23 |

Rules

| | |
|--|--------|
| Federal Rules of Civil Procedure, Rule 52(b) | 12, 13 |
|--|--------|

Statutes

| | |
|--|----------------|
| 2 Alaska Compiled Laws Annotated, 1949, Section 49-3-1.... | 29 |
| Title 28 U.S.C.A. Section 1291 | 1 |
| Title 28 U.S.C.A. Section 1294 | 2 |
| Title 28 U.S.C.A. Section 1346(b) | 1, 12, 13, 15 |
| Title 28 U.S.C.A. Section 2671 | 12, 13, 15, 32 |
| New Title U. S. Code, Section 2674 | 35 |

Texts

| | |
|-----------------------|----|
| 35 Am. Jur. 445 | 19 |
|-----------------------|----|

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vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF OF APPELLANTS.

I.

JURISDICTIONAL STATEMENT.

The District Court for the Territory of Alaska, Third Division, had jurisdiction of this matter by virtue of Title 28, Section 1346 (b).

The United States Court of Appeals for the Ninth Circuit has jurisdiction in this matter by virtue of the provisions of Section 1291, Chapter 92, of the Judiciary and Judicial Procedure Act, 28 U. S. C. A.,

June 25, 1948, c. 646, 62 Stat. 912; also, Section 8C of the Act of February 13, 1925, as amended (28 U. S. C. A. 1294). Practice in the District Court for the Territory of Alaska and appeals from the judgments rendered in said Court are all governed by the Federal Rules of Civil Procedure by virtue of 62 Stat. 445, U. S. C. A. 103A.

II.

STATEMENT OF THE CASE.

A. The Pleadings.

Plaintiffs' amended complaint filed against the United States of America, pursuant to the provisions of the Federal Tort Claims Act, charged the Alaska Railroad, an agency of the United States, with negligence in that prior to the 24th day of March, 1950, trained and instructed one Harold D. Greene in the duties of a gas car operator, pronounced and declared him qualified to act in said capacity and did on that date select and approve the said Harold D. Greene as competent and qualified to act as a gas car operator in the transportation of employees of Morrison-Knudsen Company, Peter D. Kiewit Company and S. Birch & Sons Company on and over the mainline tracks of the Alaska Railroad, and that having so examined, qualified and selected the said Harold D. Greene the Alaska Railroad delivered to the said Harold D. Greene certain rule books, timetables and other documents intended to control and limit his operation on the tracks of the Alaska Railroad as therein set forth,

and that while the said Harold D. Greene was engaged in operating the gas car on the tracks of the Alaska Railroad he was at all times acting under the direction and control of the Alaska Railroad and was required to perform his duties in accordance with the rules and regulations of the railroad. The amended complaint further alleges that while the said Harold D. Greene was engaged in operating the gas car and while transporting contractor's employees, he negligently ran his gas car with trailers attached head-on into and collided with a railroad train resulting in serious injuries to plaintiffs of such nature as to permanently affect their ability to earn a livelihood and by which reason they suffered great pain and inconvenience and were required to be hospitalized over a long period of time, for which they claimed damages in the respective amounts set forth in said amended complaint.

The United States answered and denied the negligence of any officers and employees of the Alaska Railroad and set up the defense that the acts of negligence were those of one Harold D. Greene, an employee of the construction company engaged in construction and rehabilitation work on the Alaska Railroad.

B. The Facts.

The Alaska Railroad, a common carrier by railroad of passengers and freight is owned and operated by the United States of America, by and through the Department of Interior. It traverses the area between Seward and Fairbanks, Alaska, a distance of approximately 500 miles. Its equipment, track facilities, and right-of-

way are owned by the United States and its employees are employees of the United States.

In 1949 the Alaska Railroad commenced to carry out a general construction and rehabilitation program, and pursuant to this program a contract was made with three general construction contractors, namely, Morrison-Knudsen, Peter D. Kiewit, and Birch Construction Companies, who contracted with the United States, as joint venturers, for certain construction and rehabilitation work between Anchorage and Portage, Alaska. (Defendant's Exhibit BB, Sup. Tr. 17.) (See defendant's Amended Answer para. IV.)

The contractor established a work camp at Rainbow Station for the housing and feeding of its construction workers and from that camp each day the workers, among whom were appellants, were transported to the work site at or near Indian Station approximately 5 miles south of Rainbow. The transportation of workers from camp site to work site was accomplished by the use of railroad motor cars to which were attached unpowered track cars designated as man-haul cars. The authority to operate motor cars and man-haul cars upon and over the tracks of the Alaska Railroad was made the subject of a special contract entered into between the Alaska Railroad and the Morrison-Knudsen Company, one of the joint venturers. This contract was introduced into evidence as plaintiffs' Exhibit 1 and the following provisions, among others, were included in the contract:

“WHEREAS, it is the desire of the contractor to transport their employees and equipment by rail

motor car over the tracks of the Alaska Railroad in connection with the performance of railroad construction contracts;

1. The railroad hereby agrees to rent to the Contractor Rail Motor Cars and Push Cars when, if and as required by the Contractor and if available, for operation on the rail line of the Alaska Railroad at the following rates:

* * * * *

Beginning January 1, 1949, and to continue to December 31, 1951, unless sooner terminated on ten days notice in writing from either party or by mutual written consent of the parties hereto. Rental to be payable monthly.

* * * * *

3. The Railroad shall not be held liable to the Contractor for any loss or damage to property or for any personal injury either to the Contractor or his employees, or any other person, whether such loss or damage to property or personal injury arises from the construction or operation of its railroad or from any cause whatsoever.

4. For the purpose of operation of said Rail Motor Cars the Contractor will employ competent operators, whose selection shall be approved by the Railroad, in order that careful and competent operation will be assured.

5. The operators of said Rail Motor Cars must not operate them on or over the Railroad without first obtaining a lineup in order that danger of conflict with engines and trains may be avoided and the cars must be operated in strict conformity with railroad rules and regulations.

6. The Contractor will fully indemnify the Railroad in case of loss or damage to its property

through negligent operation of said Rail Motor Cars and will make good any charge or claim that may be allowed against said Railroad through personal or property injury resulting from the presence or operation of said Rail Motor Cars on the railroad tracks.”

* * * * *

Witness John Manley, Assistant General Manager of the Alaska Railroad, identified the contract and testified that this contract was applicable to the project on which appellants were employed. (Tr. pp. 15 to 17.)

The contractor had designated one of its employees, Harold D. Greene, as the motor car operator and submitted his name to the railroad for approval as to his competency and qualifications. However, before he was permitted to operate a motor car on the tracks of the Alaska Railroad, he was brought to the offices of the railroad and given the regular examination required of all Alaska Railroad employees who operate mobile equipment on the tracks of the railroad. (Tr. pp. 34 to 37.) This examination was both written and oral, and the oral part consisted at least in part of the giving of operating instructions by the officials of the Alaska Railroad. (Tr. p. 122.) Following this examination and instruction, Greene was approved as a motor car operator and a certificate authorizing him to operate a motor car on the tracks of the Alaska Railroad was issued, bearing his name and signed by an official of the Alaska Railroad. There were also issued to him at the same time and for his guidance

and information certain official books of the Alaska Railroad, containing rules and regulations of said railroad, governing the operation of motor cars, but also containing other rules and regulations, involving railroad operations, movement of trains and the maintenance of way. These rule books were introduced into evidence as Plaintiffs' Exhibit No. 8, entitled "Manual of Safety Rules and Precautionary Measures for the General Guidance and Protection of Employees and the Public," Plaintiffs' Exhibit No. 10, entitled "Special Instruction No. 3," Plaintiffs' Exhibit No. 11, entitled "Transportation Rules and General Instructions." In addition to the foregoing, Greene was furnished with a timetable, Plaintiffs' Exhibit No. 3, which he was required to keep with him at all times, showing the movement of regularly scheduled trains on the tracks of the Alaska Railroad.

Amongst the rules promulgated by the Alaska Railroad in the manual, Plaintiffs' Exhibit No. 8, which Greene was required to adhere to in his operation of the motor car were the following:

209. The use of track cars for other than railroad business is prohibited, and no person shall ride on same unless required to do so in the line of duty.

212. No person shall operate a motor car without first having been examined on the rules, sight and hearing. He must carry a standard watch and be subject to timetable rules.

Jacks and other tools and materials shall be carried on the sides and rear of car, never on front.

224. Operation of track cars on obscured curves, long trestles or in tunnels or snowsheds must be

properly protected by flags, unless the line is known to be clear of trains, and then must move at slow speed prepared to stop within ONE-HALF OF THE DISTANCE OF UNOBSTRUCTED VIEW.

227. Track cars must not be run at speed in excess of twenty-five (25) miles per hour. All track cars shall approach frogs, derails and switch points prepared to stop, and shall pass such movable parts when route is clear, at a speed not to exceed four (4) miles per hour.

231. Persons operating track cars are required to keep themselves informed as to train movements. The foreman or operator must watch closely for signals carried so as to know if additional sections are operating. Dispatchers will give lineup to foreman of gangs operating or handling track cars, when required. Persons receiving this lineup must understand that they are given this lineup as a matter of information only and that this lineup does not relieve them of full protection of their operations and responsibilities.

232. Operators of track and motor cars running over all or part of any subdivision must secure a lineup before leaving initial station on any subdivision. Lineups will, at the time of issue, indicate all trains or track cars except section track cars operated or scheduled to be operated at a later time on the subdivision. Operators of track motor cars must make their own arrangements regarding meeting opposing track motor cars.

235. In case initial station or terminal station is at a station that is not a telegraph station or at a telegraph station that is closed, the track motor

car operator will call the nearest open telegraph station or dispatcher and secure lineup and report his departure or arrival time.

In Plaintiffs' Exhibit No. 11, among other rules and regulations, are the following:

B. Employees whose duties are in any way affected by the time-table must have a copy of the current time-table in their possession.

C. Employees must pass the required examination.

M. They must expect trains to run at any time, on any track, in either direction.

The Alaska Railroad bound Greene to strict adherence to its rules and regulations, in his operation of the man train on the tracks of the Alaska Railroad, and put him under the absolute control of the Alaska Railroad *while he was so operating*, in exactly the same manner that it controlled its section foreman, gas car operators, maintenance of way employees, and all other employees who operated mobile equipment on the Alaska Railroad. (Tr. p. 88.)

Greene commenced his man haul operations on March 20, 1950, and according to the evidence, would start from Rainbow with a load of men at approximately 7:30 A.M., each morning and haul them to the job site near Indian, a distance of approximately 5 miles. The men would work there through the day until 5:00 P.M., with $\frac{1}{2}$ hour for lunch. At or near 5:00 P.M., Greene would order the men to board the cars and proceed north to Rainbow. (Tr. p. 439.)

On March 24, 1950, Greene made his morning man haul from camp to project. At or about noon he came back to Rainbow and requested information as to the noon lineup from Foreman Bill Long. Long refused to give Greene the lineup because one of the section laborers, Hammerschild, had with Long's consent taken the lineup from the dispatcher and made an error in writing it down. (Sup. Tr. pp. 24 to 26, 33.) Ed Hamilton, roadmaster for the Alaska Railroad, who was present and apparently noticed that Greene was willing to take the lineup second hand, asked Greene if he was taking "these guys' " word for the lineup (Sup. Tr. p. 48), whereupon Greene said he would get it himself. (Sup. Tr. p. 27.) Long testified that Greene went to the telephone but that he (Long) did not know with whom he talked but thought it was the dispatcher (Sup. Tr. p. 38), and thought he wrote something down on paper. (Sup. Tr. pp. 23, 36.) Long further testified that he did not bother to get a correct lineup himself, because he did not intend to move on the tracks after lunch (Sup. Tr. p. 46.)

Later that same day at or near 3:30 P.M., Greene returned to Rainbow and came in the section house and asked Section Foreman Long if he had any more dope on the lineup, to which question Long stated that he did not. (Sup. Tr. p. 28.) Greene then went in the other room out of Long's sight and Long does not know whether he used the telephone or not, but *assumes* that he did. (Sup. Tr. p. 28.) Long stated that Greene waited for train No. 4 to go by and then said, "The railroad is mine," and took off to the south

toward Indian Station. (Sup. Tr. pp. 42, 43.) Long knew that Extra 562 South was coming from Anchorage and that the main line was not free of trains, but regardless of Greene's remark that the railroad was his, did not remind him of Extra 562 because he (Long), was not going to use the tracks, it was no concern of his. (Sup. Tr. p. 43.) Greene was, of course, heading for Indian to pick up the men and return them to Rainbow, and his remark about "the railroad is mine" could well have meant that the railroad was his with no train to be concerned with.

The testimony shows that Greene picked up approximately twenty men at the project at 5:00 P.M., and started north towards Rainbow, and on or at the point of a sharp curve at Mile 93.7 the main train ran head-on into passenger Extra 562 South.

The collision between the motor car and train resulted in the death of two men and serious injury to at least nine others. Greene, the operator, was not among the injured, he having jumped from the motor car at the first indication of impending danger.

Trial was had before the court and without a jury on the 21st day of January, 1953. Trial was completed, and the court taking the matter under advisement announced its decision several weeks later stating merely, "In cause No. A-7605 and A-7603, Dushon, et al, v. United States of America, I find the plaintiffs are not entitled to recover." No written opinion was ever filed wherein the court stated its reasons for holding the plaintiffs not entitled to recover.

On May 23, 1953, the trial judge died. At the time of his death no Findings of Fact and Conclusions of Law or Judgment had been prepared and entered, and after his appointment in November of 1953, the Honorable J. L. McCarrey, Jr., successor to the trial judge, based on stipulation of counsel, filed and entered Findings of Fact, Conclusions of Law, and Judgment, from which Judgment plaintiffs bring this appeal.

III.

QUESTIONS INVOLVED AND HOW RAISED.

The only question involved in this appeal is whether or not the injuries suffered by the plaintiffs, for which they seek damages against the United States, were caused by the negligence of any employee of the Government, as the term is used in New Title 28, U. S. Code, Chapter 85, Section 1346(b) and as defined in Chapter 171, Section 2671.

There is little if any dispute as to the facts of the case as shown by the evidence at the trial.

Rule 52 (b) of the Federal Rules of Civil Procedure contains the following provision:

“When findings of fact are made in actions tried by the Court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the District Court an objection to such findings or has made a motion to amend them or a motion for judgment.”

The question involved in this appeal is whether or not Harold D. Greene who was operating a track car with trailers connected was at the time of the collision acting in the capacity of an "employee of the government" as the term is used in Section 1346 (b) of New Title 28, U. S. Code and as the term is defined in Section 2671 thereof.

The question is raised on this appeal pursuant to the provisions of Rule 52 (b) above quoted.

IV.

SPECIFICATIONS OF ERROR.

No. 1.

Rule 18, paragraph 2(d) of the Rules of this Appellate Court contains the following provision:

"In all cases, when Findings are specified as error, the specification shall state as particularly as may be wherein the Findings of Fact and Conclusions of Law are alleged to be erroneous."

Findings of Fact IX was in part as follows:

"That track car operator Harold D. Greene, who was at the time an employee of an independent contractor and not of the defendant * * * ."

* * * * *

"* * * that it was not established that the Alaska Railroad or any employee or agent thereof was negligent."

The statements above quoted are alleged to be erroneous in that, at the time of the collision in which

plaintiffs were injured, Harold D. Greene was operating a track car on the main line of the Alaska Railroad and was operating under the direction and control of the Alaska Railroad and not of the independent contractor, and was in fact the employee of the Alaska Railroad, and in that the evidence did establish that Harold D. Greene, as such employee, was negligent.

No. 2.

The trial court's Conclusions of Law were as follows:

1. That the sole and proximate cause of the said collision and the injuries of the plaintiffs was the negligence of track car operator Harold D. Greene; that such negligence proximately causing the plaintiffs' injuries was that of an employee of an independent contractor and not of the defendant; that further said employee was employed by a government contractor within the meaning of the Federal Tort Claims Act and therefore not an "employee of the government" within the meaning of said act.

2. That the plaintiffs have not established, as required by the Federal Tort Claims Act, that their injuries were proximately caused by the negligence of a designated employee or any employee of the defendant.

These conclusions of law are alleged to be erroneous for the same reasons above set forth in Specification of Error No. 1 as to wherein Findings of Fact IX is erroneous.

V.

ARGUMENT.

In this argument Morrison-Knudsen, Inc., a corporation and its associates in the contract with the Government for the construction and rehabilitation work on the Alaska Railroad will be hereinafter referred to as Morrison-Knudsen.

It is alleged in the complaint and admitted in the answer in the action in which appeal has been taken from the Judgment, that the injuries suffered by the plaintiffs were the result of the negligence of one Harold D. Greene who at the time of the collision described in the complaint and in the Findings of Fact was operating a track car on the main line of the Alaska Railroad. It will be conceded by appellee that plaintiffs' injuries were so caused.

The question to be determined by this Appellate Court is whether or not the said Greene at the time of said collision was an employee of the Government in the sense that term is used in the Federal Tort Claims Act, New Title 28 U. S. Code, Chap. 85, Section 1346 (b), and defined in Section 2671 of said New Title 28.

In the latter section "employee of the Government" is defined as including officers or employees of any federal agency.

It will not be disputed that the Alaska Railroad is a federal agency as defined in Section 2671.

It is incumbent on the plaintiffs to demonstrate to this Appellate Court that Harold D. Greene was an

employee of the defendant, the United States, in operating the gas car at the time of the collision.

Morrison-Knudsen was a contractor with the United States. It is conceded that the general rule is that a contractee, in this case, the United States, is not liable for the torts or negligence of its contractor, in this case, Morrison-Knudsen, or its contractor's servants. This is true because an independent contractor, so long as he acts in that capacity is not the agent or servant of the contractee.

The application of this rule, however, admits of many exceptions and the facts present a situation clearly within several of these exceptions.

A controlling principle of law which applies to this situation is clearly stated in *Chicago B&I Railway Co. v. Willard*, 220 U.S. 413. Particular attention is called to pages 422-424 of the opinion in that case, including the following quoted with approval by Justice Harlan.

"We think this court is committed to the view held by the current of authorities on this question, and, moreover, that, in sound reason and *as the better public policy* the doctrine should be maintained that the lessor company shall be required to answer for the consequence of the lessee company in the operation of the road, *not only to the public but also to servants of the lessee company who have been injured by actionable negligence of the lessee company.*"

"Therefore it is, that though a railroad company may, *by lease or otherwise*, entrust the execution of its chartered powers and duties to a lessee

company, this court has expressed the view that the lessee company, while engaged in exercising such chartered privileges or chartered powers of the railroad company, *is to be regarded as the servant or agent of the lessor company.*”

“The law has become settled in this state, by an unbroken line of decisions, that the grant of a franchise, giving the right to build, own and operate a railway carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others; and where injuries result from the negligent or unlawful operation of the railroad whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable.”

In the case on appeal the Alaska Railroad had the franchise and authorized and permitted Morrison-Knudsen to use its tracks and became liable in damages for injuries to third persons caused by the negligence of Morrison-Knudsen. Of course, Morrison-Knudsen could be negligent only through the actions of its officers, employees, or agents.

“All of the authorities hold that when a railroad company leases or contracts the use of its tracks to another and damages are suffered by third persons on account of actionable negligence on the part of either, both the lessor and lessee are liable for such damages.”

Midland Valley R. Co. v. Toomer, 162 Pac. 1127-30.

Morrison-Knudsen was an independent contractor engaged in railroad construction operation. To facilitate railroad construction and rehabilitation Morrison-Knudsen was permitted by the Alaska Railroad to use its line and tracks. Under the principle announced in the foregoing decisions, and there are none to the contrary, the independent contractor rule would not apply to the use of the Alaska Railroad tracks by Morrison-Knudsen.

The Government could lease or license Morrison-Knudsen to operate track cars on its tracks but could not by such delegation of authority escape liability in damages for the torts of Morrison-Knudsen while so operating.

In such operation Morrison-Knudsen became the agent of the defendant and their employee in such operation, in this case Harold D. Greene, became the employee of the defendant, and the doctrine of *respondeat superior* applies.

“Public policy requires that a corporation chartered to perform the public duties of a common carrier should not be permitted to contract with persons who may be irresponsible, for the performance of a part of its duties under its charters and thus avoid responsibility for the negligent performance thereof.”

Liberty Highway Company v. Callahan, 157 N.E. 708.

RIGHT OF CONTROL.

The master and servant relationship depends primarily upon the right of control.

35 Am. Jur. 445.

“While it is said that in common law there are four elements which are considered upon the question whether the relationship of master and servant exists—namely, the selection and engagement of the servant, the payment of wages, the power of dismissal, and the power or control of the servant’s conduct,—the really essential element of the relationship is the right of control—the right of one person, the master, to order and control another, the servant, in the performance of work by the latter, and the right to direct the manner in which the work is to be done * * *”.

Matcovich v. Anglim, 134 Fed. (2d) 834.

In support of this principle appellants cite also *Denton v. Yazoo & M. V. R. Co. et al.*, 284 U.S. 305, as follows:

“Question whether work which servant was doing when injuring third person was work of one person or of another may usually be determined by ascertaining under whose authority and command work was being done.

“When one person puts his servant at disposal and under control of another to perform a particular service for latter, servant, respecting acts in such service, should be dealt with as latter’s servant.” (Syllabus.)

We quote also the following from *State of Maryland v. Manor Real Estate and Trust Co. et al.*, 176 Fed. (2d) 414, Opinion 8.

“The defendant also contends that it is relieved from liability under the Federal Tort Claims Act, 28 U. S. C. A. Para. 1314 (b) because the jurisdiction of the District Courts to entertain actions on claims against the United States for injury to property of persons is limited by the statute to negligent or wrongful acts or omissions of any employee of the government acting within the scope of his employment, and an employee is defined in 28 U. S. C. A. 2671 as a person acting on behalf of the federal agency in an official capacity. It is said that Dugan was in complete charge of the management of the property as an independent contractor and hence Anderson’s death was not caused by the negligent act or omission of any employee of the government. There is no substance in this connection because the evidence shows that Dugan was subject to the detailed supervision of the Public Housing Authority, and that in his contract for the management of the property he agreed to be bound by the regulations issued by the government in the form of a contract manager’s manual, and by all amendments thereto.”

In this case Greene was in the general employment of Morrison-Knudsen for purposes connected with the work being done for the Government and in connection with his employment used and operated a gas car on the defendant’s railroad tracks. He was subject to the orders of Morrison-Knudsen as to where to go for the purpose of hauling men and supplies and with

respect to all duties which he was employed to perform. Morrison-Knudsen could instruct him, for instance, to proceed with his track car to Anchorage for the purpose of picking up laborers, machinery or anything needed by it in its construction operation.

But, from the moment Greene started to operate the track car on the Alaska Railroad he was subject to the direct control of the Alaska Railroad with respect to operating the car.

In *Standard Oil Co. v. Parkinson*, 152 F. 681, 682, the late Judge Walter H. Sanborn laid down a test for the application of the rule, *respondeat superior*, which is an aid to clear thinking in a case such as this. He said:

“The test of liability for the act or omission of an alleged servant is his right and power to direct and control his agent in the performance of the actual act or omission at the very instant of the act or neglect. There can be no recovery of a person for the act or omission of his alleged servant under the maxim ‘Respondeat Superior’, in the absence of the right and power in the former to command or direct the latter in the performance of the act or omission charged, because in such a case there is no superior to respond.”

P. F. Collier & Son Distributing Corp. v. Drinkwater, 81 F. (2d), p. 202, Opinion (2).

“The relationship of master and servant exists where the employer has the right to direct and control the method and manner in which the work is to be done and the result to be accomplished, while an independent contractor is one engaged to

perform service for another according to his own method and manner freely from direction and control of the employer in all matters relating to the performance of the work, except as the result of the product. The line of separation between the two is the degree of direction and control. In the former, the result produced; in the latter direction and control are limited to the result and do not apply to the method and manner of the service rendered.”

Jones v. Goodson, 121 F. (2d), 179, Opinion (2).

Applying the principles of law stated in the foregoing decisions we have this situation: Greene was employed by Morrison-Knudsen, et al., contractors, to operate his gas car over the tracks of the defendant in transporting their employees to and from work, at certain hours of the day. He was under the control of the contractors as to the result to be accomplished. As to the operation of the gas car in that transportation he was under the absolute control of the defendant. He was selected with the approval of the defendant after being examined and qualified by the defendant. The examination was partly educational. The witness Manley testified that when his answers were hazy, the rules were explained to him. He was equipped with copies of defendant's rules, regulations and timetables. He was on June 6th, 1949, issued a certificate of qualification. He accepted the employment under the conditions imposed by defendant's rules and regulations. He was bound not to exceed a prescribed speed—to use flags when necessary and advisable, and above all never to proceed upon the tracks unless he knew

they were clear. As to all these details of operation the defendant had absolute right of control and the contractors no control whatsoever—

Greene's violation of the rules did not relieve the defendant from liability.

Linman v. Murphy, 232 S.W. (2d) 937.

Furthermore, in the operation of the gas car Greene was engaged in the business of the defendant. It may be that in a sense it was the business of Morrison-Knudsen to arrange for the transportation of their men, from the camp where they lived to the job-site where employed, and return—but all transportation over the tracks of the defendant was the business of the defendant, which as has been demonstrated could not be delegated so as to relieve the defendant of responsibility.

See also:

American Pacific Whaling Co. v. Kristensen, 93 F. (2d) 20 (9th Cir.);

International Great Northern R. Co. v. Lucas, 70 S.W. (2d) 226.

“Work of handling mail, done by men furnished by railroads under postal regulations held governmental work, relieve railroads from liability for injury to railway postal clerks.”

Denton v. Yazoo & M. V. R. Co., et al., 284 U.S. 305;

Doll & Sons v. Rebetti, 203 F. 593;

State of Maryland v. Manor Real Estate & Trust Co. (Tort Claims Act) 176 Fed. Rep. (2d) 419.

According to all the authorities heretofore cited and none can be cited to the contrary, the defendant was charged with the absolute duty of the safe operation of the Alaska Railroad and all operations on its tracks.

Greene was employed by Morrison-Knudsen contractors to operate gas cars over the tracks of the defendant in transporting their employees to and from work, at certain hours of the day. He was under the control of the contractors as to the result to be accomplished. As to the operation of the gas car in that transportation he was under the absolute control of the defendant. He was selected by Morrison-Knudsen with the approval of the defendant after being examined and qualified by the defendant. This selection was pursuant to a written contract between the Alaska Railroad and Morrison-Knudsen entered into on January 1, 1949. This contract was admitted in evidence and marked plaintiffs' Exhibit No. 1 (See Tr. Vol. I, P. 15).

Pertinent parts of this contract follow:

“MEMORANDUM OF AGREEMENT entered into by and between The Alaska Railroad, hereinafter called the ‘Railroad’, and the Morrison-Knudsen Company, Inc., of Anchorage, Alaska, hereinafter called the ‘Contractor’, WITNESSETH that:

WHEREAS, it is the desire of the Contractor to transport their employees and equipment by rail motor car over the tracks of the Alaska Railroad in connection with the performance of Railroad construction contracts; and

WHEREAS, the Railroad has certain equipment available for such transportation of employees and equipment.

IT IS HEREBY UNDERSTOOD AND AGREED by and between the parties hereto as follows:

1. The Railroad hereby agrees to rent to the Contractor Rail Motor Cars and Push Cars when, if and as required by the Contractor and if available, for operation on the rail line of the Alaska Railroad at the following rates:

| | |
|-----------------|------------------------------|
| Rail Motor Cars | Each \$1.00 per calendar day |
| Push Cars | Each \$0.25 per calendar day |

* * * * *

3. The Railroad shall not be held liable to the Contractor for any loss or damage to property or from any personal injury either to the Contractor or his employees, or any other person, whether such loss or damage to property or personal injury arises from the construction or operation of its railroad or from any cause whatsoever.

4. For the purpose of operation of said Rail Motor Cars the Contractor will employ competent operators, whose selection shall be approved by the Railroad, in order that careful and competent operation will be assured.

5. The operators of said Rail Motor Cars must not operate them on or over the Railroad without first obtaining a lineup in order that danger of conflict with engines and trains may be avoided and the cars must be operated in strict conformity with railroad rules and regulations.

6. The Contractor will fully indemnify the Railroad in case of loss or damage to its property

through negligent operation of said Rail Motor Cars and will make good any charge or claim that may be allowed against said Railroad through personal or property injury resulting from the presence or operation of said Railroad Motor Cars on the railroad tracks." (Italics ours)

Particular attention is called to the italicized portion of the preceding paragraph. It is perfectly evident that the Alaska Railroad attorneys recognized the general law that when they permitted another concern to use their cars and tracks for construction purposes they were liable in damages to any persons injured on account of the operation of said railroad motor cars on the Alaska Railroad tracks, and therefore caused to be inserted in the contract the above indemnity provision.

The testimony in this case shows that one George Leedy was one of the attorneys for the defendant. Leedy was also the Seattle attorney for Morrison-Knudsen by an arrangement with the Assistant District Attorney, Arthur D. Talbot. Leedy was associated as attorney for the defendant in the trial of the case. He took a prominent part in the trial and frequently took exception to the admission of evidence on the ground that it was not binding upon his client Morrison-Knudsen, in order that should the case terminate in a judgment for plaintiffs it would be clear that the judgment was in res adjudicata as to Morrison-Knudsen.

John E. Manley was the Assistant Manager of the Alaska Railroad and at the time of the accident and prior thereto and for a long time afterwards was the

Acting Manager of the Alaska Railroad. Transcript, Page 5. Manley, his attention having been called to paragraph number 1 in the contract, plaintiffs' Exhibit No. 1, on direct examination, questioned by Mr. Grigsby, testified as follows:

"Q. Was that agreement carried out, to your knowledge—were the motor cars and push cars rented to Morrison-Knudsen and associates under that agreement?

A. I know there were motor cars rented I am not sure about the push cars.

Q. Do you know who owned the motor car—the motor car operated by Harold D. Greene on the date of the accident?

A. I think our records will indicate that it was owned by the Alaska Railroad.

Q. Do you know that it was leased under this agreement?

A. Yes sir.

* * * * *

Q. Now I will call your attention to the paragraph which states 'for the purpose of operation of certain rail motor cars the contractor will employ competent operators whose selection will be approved by the Railroad in order that careful and competent operation will be assured'. Now in your capacity as Assistant Manager, how long have you been Assistant Manager Mr. Manley?

A. Since approximately July of 1949.

* * * * *

Q. Do you know that Harold D. Greene was occupied as a motor car operator on March 24, 1950?

A. On that particular day he was operating a motor car.

Q. He was; and do you know whether his selection for operating that car was approved by the railroad?

A. He was approved by our Rules Examiner.

Q. He was approved; and was he issued a certificate which qualified him to operate a motor car generally or for Morrison-Knudsen Company, or anybody else—a certificate authorizing him to operate motor cars on your railroad?

A. Our records show he was.

Q. Have you a copy of that record or of the certificate issued to him?

A. No sir.

Q. Have you a record showing it was issued to him?

A. Yes sir.

Q. Do the records show that he was issued Alaska Railroad certificate No. 1036?"

At this point Mr. Talbot offered to stipulate that the records so showed.

By Mr. Grigsby:

"Q. This says he was examined for the purpose of obtaining a certificate, is that right Mr. Talbot?

A. Yes, but to the best of my knowledge no copies were made of that certificate—the original only, and Greene has it.

* * * * *

Q. Then his employment on the Turnagain Arm Project in March, 1950 was approved and authorized by the Alaska Railroad?

A. He was qualified as a gas car operator, the capacity for which Morrison-Knudsen hired him. I have no way of knowing.

Q. Well, the selection by them was approved by the Railroad—you did pass him as qualified to operate motor cars for Morrison-Knudsen on the railroad if they wanted to select him for that? Right?

A. Right?

Q. Now Mr. Manley, as a gas car operator in the employ—as a general employee of Morrison-Knudsen and having been examined by you and qualified for that purpose was he subject to the rules and regulations of the Alaska Railroad?

A. He was subject to the same rules and regulations as pertained to gas car operators — as Alaska Railroad gas car operators.

* * * * *

Q. And was he subject to the rules that pertained to gas car operators with regard to obtaining lineups?

A. He was.

Q. And was he subject to the regulations as to operating a gas car over the railroad without first obtaining a lineup—to follow the regulations?

A. He was subject to the gas car regulations the same as the Alaska Railroad employees operating a gas car—only insofar as gas car operators are concerned.”

(Pages 16-24, TR)

The franchise of the Alaska Railroad is the Alaska Railroad Act, A.C.L. Annot. 1949, Vol. II, Sec. 4931.

By the terms of this act the President of the United States is empowered, authorized and directed, among other things, “to designate and cause to be located a route or routes for a line or lines of railroad in the

Territory of Alaska not to exceed in the aggregate 1000 miles and to construct and build a railroad or railroads as he may so designate and locate and operate the same." This Railroad Act was mandatory. Under its provisions it became not only the right but the duty of the United States to build and operate a railroad. This right and duty is according to all the authorities non-delegable. That is to say, the owner of the franchise, that is the United States, while it is empowered by the Railroad Act to lease the said railroad or railroads or any portion thereof, cannot according to the unanimous authorities thereby escape liability for damages suffered by third persons. Likewise as the authorities heretofore cited hold, and no authority can be found to the contrary, no railroad company can license or permit the use of its equipment and/or railroad lines by another corporation, or concern or individual, and escape liability. The testimony in this case, and this will be conceded, shows that Harold D. Greene carried with him the rules and regulations of the Alaska Railroad. That he was bound by the instructions contained therein and having been selected by Morrison-Knudsen Company as a gas car operator and having been examined by the Alaska Railroad and his selection approved he was under the direction and control of the Alaska Railroad management at all times while operating a motor or gas car.

It was Greene's duty to operate according to the terms of the contract, plaintiffs' Exhibit No. 1, pursuant to which he was authorized to operate, at all times subject to the direction and control of the Alaska

Railroad and unhampered by any directions of Morrison-Knudsen. Fortuitously and unfortunately the collision occurred while the motor car operated by Greene was rounding a very sharp curve. At that time Morrison-Knudsen was engaged in the construction of a railroad track which, when completed, would eliminate and eventually did eliminate dangerous curves on the railroad line, including the curve where the collision happened. There were many dangerous curves between the job site where the plaintiffs were employed and the camp where they lived as well as some stretches of railroad without curves. The evidence in the case shows that the fireman of Train 562 South first sighted Greene's car when it was about seventy-five feet distant. Although the brakes were applied immediately both on the 562 engine and on Greene's motor car the collision could not be prevented. It was Greene's duty under the railroad rules and regulations, which he carried with him at all times, before rounding the curve to send ahead a flagman for the protection of both an oncoming train and his motor car and the passengers thereon. It was Greene's duty to have positively known the track was clear before he rounded the curve. As said before, the pleadings admit and the findings of fact state that Greene had knowledge that train No. 562 South was in the vicinity.

The Tort Claims Act was passed for the purpose of enabling all persons who suffer injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his

office or employment, to recover damages for such injuries, loss of property, or personal injury or death.

Under the terms of the Act the negligent or wrongful Act or omission must have been caused by an "employee of the government" as defined in Section 2671.

It may be true, as no doubt will be contended by the attorneys for the United States in their brief that the Federal Tort Claims Act should be strictly construed as against the claimant. If that is the law it will be the duty of the attorneys for the government to rely on that principle.

But this does not mean that it will be their duty to advance far-fetched technicalities in their argument.

The primary purpose of the Act was to do justice to claimants.

The attorneys for the government will concede that a master or employer is responsible for the wrongful acts of his servant or employee committed within the scope of his employment.

They will undoubtedly insist, however, that an "employee of the government" means an employee hired and paid by the government and as to whom the government may exercise the right of discharge.

The Tort Claims Act however, does not so define "employee of the government". It does not define the term at all except to state in Section 2671 that it includes employees of any federal agency. The term

“employee” is nowhere defined by any Act of Congress.

We must look to the common law and the decisions of the courts for a definition and according to *Matcovich v. Anglim*, 134 Fed. (2d) 834 (9th Cir.):

“While the selection and engagement of the servant, the payment of wages, the power of dismissal, and the power of the control of the servants’ conduct are to be considered—the really essential element of the relationship is the right of control.”

Morrison-Knudsen had the right of control of Harold D. Greene in respect to his general duties. They had the right to discharge, they had the right to use him as a gas car operator subject to the approval of the Alaska Railroad, and the Alaska Railroad did approve his selection. Morrison-Knudsen had all rights to direct Greene where to go with the gas car, when to go, and for what purpose at all times subject to the Rules and Regulations of the Alaska Railroad, but according to all authorities they had no right to direct or instruct him as to how to operate the car. That power could not be delegated and as stated before the authorities are unanimous and there are none to the contrary that a permittee using the tracks and/or equipment on a railroad while transporting persons or equipment becomes the employee of the railroad.

However, while the Government did not have the power to discharge Greene from the general employment of Morrison-Knudsen they did have the right to

discharge Greene as a track car operator on their tracks. In fact the Alaska Railroad did exercise that power on April 3rd, ten days after the collision. John E. Manley, the Acting Manager of the Alaska Railroad, wrote a letter directed to Morrison-Knudsen Co at Anchorage, Alaska. This letter was written after an investigation by the Alaska Railroad as to the cause of the collision in which plaintiffs were injured. In this letter Manley stated, referring to Passenger No. 565 South:

“A thorough check of our records show that this train was indicated on both the 7 A.M. and noon lineup of March 24, 1950. Accordingly, we have no alternative but to disqualify Mr. Greene as a gas car operator and he will not be permitted to operate a gas car on the Alaska Railroad in the future. We regret the necessity for this action.”

This letter was offered in evidence by the defendant admitted without objection by the plaintiffs and marked Defendant's Exhibit “A”. (TR. 127.)

VI.

CONCLUSION.

Appellants contend that it has been conclusively established by the authorities cited in this brief that:

1. At the time of the collision Harold D. Greene was an employee of the Alaska Railroad in the sense that term is used in the Federal Tort Claims Act.

2. It is conceded by the attorneys for appellee and so found in the Findings of Fact and Conclusions of Law that the injuries suffered by plaintiffs were the result of the negligence of Harold D. Greene.

3. The Alaska Railroad investigated the cause of the collision and found that it was caused by the negligence of Greene and revoked the permission heretofore given to Morrison-Knudsen to use Greene as an operator of a gas car on their tracks.

The testimony in this case reveals that Harold D. Greene was so grossly negligent that were the defendant a private corporation punitive damages could be recovered. Under Section 2674, New Title U. S. Code, the United States is not liable for punitive damages.

However, if this Appellate Court decides that this appeal should result in a reversal the amount of damages to be recovered will be for the Trial Court to decide.

Seven plaintiffs sued for damages aggregating 1,500,000.00. The amount of recovery will depend largely upon the testimony of doctors and surgeons. The amount sued for averages about \$200,000.00 per plaintiff. This amount is not so large as to shock the conscience. Judgments for amounts in excess of \$200,000.00 for total disability have frequently been sustained by the courts. The total disability of a laborer has been held to mean his total inability to earn his living by labor. No amount of money can compensate a man who has been rendered a cripple for life by the negligent act of another. Judgments for damages are

rendered in order to make his life more endurable rather than as compensation. The judgment of the Trial Court should be reversed.

Dated, Anchorage, Alaska,
January 2, 1957.

Respectfully submitted,

GEORGE B. GRIGSBY,

HAROLD J. BUTCHER,

Attorneys for Appellants.

No. 14,922

IN THE

United States Court of Appeals
For the Ninth Circuit

GEORGE DUSHON, HAROLD RATHGEB, HILTON
DUKE, PETER J. VALLENTINE, NELS PIL-
SKOG, JOE MISZENCIN and THOMAS J.
GOLDEN,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF OF APPELLEE.

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Subject Index

| | Page |
|---|------|
| I. Jurisdiction | 1 |
| II. Statement of the case | 2 |
| A. Pleadings | 2 |
| B. The facts | 2 |
| III. Questions involved | 7 |
| IV. Summary of argument | 7 |
| V. Argument | 9 |
| A. Defendant is not liable for torts of independent contractor | 9 |
| (1) Charter obligations | 9 |
| (2) No lease arrangement involved | 13 |
| (3) The relationship of licensee | 15 |
| (4) Dangerous instrumentality | 16 |
| B. Harold D. Greene was not the appellee's employee | 18 |
| VI. Conclusion | 24 |

Table of Authorities Cited

| Cases | Pages |
|--|------------|
| American Pacific Whaling v. Kristensen, 93 Fed. (2d) 17 | 16 |
| Atlanta & F. R. Company v. Kimberly, 87 Ga. 161, 13 S. E. 227 | 10 |
| Boyd v. Chicago & N. R. Company, 217 Ill. 332, 75 N. E. 496 | 10 |
| Central of Georgia Rail Co. v. Bessinger, 17 Ga. App. 617, 87 S. E. 920 | 15 |
| Chicago, Burlington & Quincy Railroad v. Willard, 220 U. S. 413 | 14 |
| Cunningham v. International Rail Co., 51 Tex. 503, 32 Am. Rep. 632 | 10 |
| Dalehite v. United States, 346 U. S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 | 16, 24, 25 |
| Denton v. Yazoo and M. V. R. Company, 284 U. S. 305 | 20 |
| Doll & Sons v. Rebetti (3 CCA), 203 Fed. 593 | 16 |
| Engler v. Seattle, 40 Wash. 72 | 23 |
| Hanna v. Chattanooga & Nashville R. Co., 88 Tenn. 310, 12 S. W. 718 | 10, 15 |
| Harger v. Harger, 144 Ark. 375, 222 S. W. 736 | 25 |
| Hopson v. U. S., DC Ark. 136 Fed. Supp. 804 | 25 |
| Humble Oil & Refining Co. v. Bell, et al. (Tex. Civ. App.), 180 S. W. (2d) 970 | 16 |
| International-Great Northern Railway Company v. Lucas, 70 S.W. (2d) 226 | 13 |
| Liberty Highway Company v. Callahan, 157 N. E. 708 | 13 |
| Matcovich v. Anglin, 134 Fed. (2d) 834 | 19 |
| Midland Valley R. Co. v. Toomer, 162 Pac. 1127-30 | 14 |
| Salmon v. Kansas City, 241 Mo. 14, 145 S. W. 16, 39 LRA (NS) 328 | 21, 23 |
| Sanford v. Pawtucket St. Rail Co., 19 RI 537, 35 Atl. 67 ... | 10 |

TABLE OF AUTHORITIES CITED

iii

| | Pages |
|---|-------|
| Scarborough v. Alabama Midland Co., 92 Ala. 497, 10 So. 316 | 10 |
| Standard Oil Co. v. Anderson, 212 U. S. 215 | 20 |
| Standard Oil Co. v. Parkinson, 152 Fed. 681 | 20 |
| State of Maryland v. Manor Real Estate & Trust Co., 176 Fed. (2d) 414 | 20 |
| Strangi v. United States, 211 Fed. Supp. 305, 307 | 25 |
| Texas Electric Service Co. v. Holt, 249 S. W. (2d) 662 | 17 |
| United States v. Hull, 195 Fed. (2d) 64 | 16 |
| United States v. Sharpe, 189 Fed. (2d) 239 | 19 |
| Watt v. United States, 123 Fed. Supp. 906, 911 | 24 |

Statutes

| | |
|----------------------------|--------------|
| 49-3-1 ACLA | 8 |
| 49-3-2 ACLA | 9 |
| 28 USC 1346b | 1, 24 |
| 28 USCA 2671 | 1, 7, 9 |
| 33 USCA Sec. 901-950 | 2 |
| 42 USCA Sec. 1651-54 | 1 |
| 48 USCA 301-308 | 8, 9, 10, 12 |

Texts

| | |
|--|----|
| 20 ALR 684, 719 | 23 |
| 28 ALR 122 | 9 |
| 74 CJS 895, Sec. 364b | 15 |
| Elliott on Railroads, 3d Ed., Secs. 411-414, 514 | 14 |
| 6 LRA 727 | 10 |
| 39 LRA (NS) 335 | 22 |

No. 14,922

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GEORGE DUSHON, HAROLD RATHGEB, HILTON
DUKE, PETER J. VALLENTINE, NELS PIL-
SKOG, JOE MISZENCIN and THOMAS J.
GOLDEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF OF APPELLEE.

I. JURISDICTION.

In amplification of the appellants' jurisdictional statement, Title 28, Section 2671 (28 USCA 2671), 62 Stat. 982, as amended, defines certain terms used in Title 28, Section 1346(b). Although the Federal Defense Bases Act, Title 42 (Chapter 11, "Compensation for Disability or Death to Persons Employed at Military, Air and Naval Bases Outside the United States"), 1651-54, (42 USCA 1651-4), 55 Stat. 622-3,

as amended, which adopts the provisions of The Longshoremen's and Harbor Worker's Compensation Act, Title 33, Sections 901-950 (33 USCA 901-950) was applicable to the plaintiffs, they have the right to receive compensation or to recover damages against a third party liable for damages (in this instance alleged to be the United States of America as owner and operator, through its instrumentality, of the Alaska Railroad). The plaintiffs maintained their action by election under the provisions of Title 33, Section 933 (33 USCA 933) 44 Stat. 1440, as amended.

II. STATEMENT OF THE CASE.

A. Pleadings.

The restriction by the appellants of their specifications of error on which they rely, make it unnecessary to point out the additional defenses set up by the appellee in its pleadings.

B. The Facts.

Under terms of a contract entitled "Turnagain Arm Project, Section G", which contract was entered into under date of May 20, 1949 and admitted into evidence as defendant's Exhibit BB (STR. 17), the successful bidders, three heavy construction contractors, Morrison-Knudsen Co., Inc., a Delaware corporation, Peter Kiewit Sons Company, a Nebraska corporation, and S. Birch & Sons Construction Company, a Montana corporation, joined together in a joint venture which was known as Morrison-Kiewit-Birch

(hereinafter referred to simply as the Contractor) and undertook to rehabilitate a portion of the Alaska Railroad tracks south of Anchorage, between two stations known as Potter and Indian (TR. 432, 433, 443) (STR. 2, 15). The contracting corporations which formed the joint venture were experienced and competent independent contractors and were deemed by the defendant to be qualified for the job (STR. 18). The job site location necessitated that men, equipment and materials be moved over the Alaska Railroad tracks to the place of work. The right of access to the job was derived from said contract (Defendant's Exhibit BB) (TR. 96, 127, 131) but in order to obtain such access the contractor had to provide motor cars for utilization of the tracks of the Alaska Railroad. Some of these cars were purchased by the contractor and some were rented from Morrison-Knudsen Co., Inc. (TR. 436) who in turn had a previous rental agreement with the Alaska Railroad (Plaintiffs' Exhibit 1). This rental or leasing agreement for rail motor cars and push cars which was entered into under date of January 1, 1949 was between Morrison-Knudsen Co., Inc., alone (and not the contractor) and Alaska Railroad, the date of which was coincidental with prior rehabilitation work being performed by Morrison-Knudsen Co., Inc. (TR. 22). Said rental agreement (Plaintiffs' Exhibit 1) did not pertain to the Turnagain Arm Project, Section G (TR. 446, 449, 450, 452).

In permitting the contractor to operate upon its tracks, the Alaska Railroad never hired nor sent any

motor car operators anywhere for the contractor (TR. 129). However, the contractor's employees who were to operate rail motor cars were required by the Alaska Railroad to conform to certain of its operating procedures (TR. 23, 24, 97) and the Alaska Railroad retained the right to approve any motor car operator selected by the contractor (TR. 459, 463). In order to determine whether the contractor's employees whom the contractor had designated to operate rail motor cars were qualified so to do, the Alaska Railroad required such motor car operators to be examined, both written and oral, as to the operating rules of the railroad (TR. 19, 34, 35, 91). Upon such approval being given, a certificate of examination was delivered to that person. Such a certificate did not constitute a permit or license for that person to operate on the railroad's tracks but was merely a means of identifying that such person was qualified to operate a rail motor car (TR. 102, 103, 104, 126, 127, 128). In this instance Alaska Railroad certificate of examination No. 1036 was issued to Harold D. Greene, (TR. 18) (Plaintiffs' Exhibit 2) (TR. 19-21) after due examination (TR. 22) (Plaintiffs' Exhibits 4 and 5), (TR. 29, 34, 35, 37 and 130), he being the same person who subsequently was operating the rail motor car and man haul cars which collided with Alaska Railroad's "Passenger Extra 562 South", resulting in the plaintiffs' injuries.

Harold D. Greene had been employed in July, 1948 by Morrison-Knudsen Co., Inc., on another project near Fairbanks as an "expediter" (STR. 3, 8, 9).

He continued in the employ of that firm (except for winter layoffs) until he was employed in March 1950 by the contractor to operate rail motor cars on the Turnagain Arm Project (Defendant's Exhibit BB) (TR. 435, STR. 10, 11). Greene's salary was paid by the contractor (STR. 3, TR. 97). He was selected for the job by Gus Rathert, the project manager for the contractor (TR. 435, 448) and all of Greene's directions and orders to perform work were given by the contractor, principally through the project manager, Gus Rathert (TR. 435, 436, 437). There was no direct relationship between the Alaska Railroad and Greene (TR. 90). There were no orders or other restrictions given to or placed upon Greene by the Alaska Railroad in the use of the portion of track (12.2 miles) between Potter and Indian except that he had been examined and approved as a motor car operator and was supposed to obey the rules and keep out of the way of the trains of the Alaska Railroad (TR. 436, 437) (TR. 18, 23, 24, 25, 57). The various rules and regulations adopted by the Alaska Railroad were in force for the purpose of the safety and protection of the railroad's property and passengers (TR. 76). In the event of an infraction of those rules, Greene was not subject to be penalized by the Alaska Railroad, as he did not work for the railroad, but was only subject to disqualification as a rail motor car operator (TR. 88, 89, 90, 100). Part of the railroad's operating procedure was to issue (TR. 93) and transmit (TR. 283, 287, 300, 301, 314) twice a day to its personnel involved information of contemplated movements taking place upon its tracks, which infor-

mation was called a "lineup". As a rail motor car operator, Greene, in order to conform to the railroad's rules and regulations had to obtain such a lineup (TR. 126). The movements of Greene's motor car also appeared on the "lineup" (TR. 98), but a "lineup" was for information only and conveyed no authority from the railroad to operate (TR. 92, 98). Safety precautions of the railroad required that in rounding a curve (such as the one on which the collision occurred) where the view was obstructed, a flagman must be sent out to protect the motor car from any approaching train, (TR. 92, 93, 94, 323) and it was the responsibility of the rail motor car operator to see that the track was clear (TR. 233, 291, 484).

Rainbow was the contractor's campsite and was located on the work area, south of Potter and approximately 4.8 miles north of Indian. On March 24, 1950, Greene was under orders of the contractor (TR. 437, 440, 465) to proceed south from Rainbow to Indian and pick up a work crew at the end of the day's shift at approximately 5 o'clock P.M. and return them to camp. Greene had received the line-ups for the day (STR. 23, 24, 26). After train No. 4, which was going north, left Rainbow about 3:45 o'clock, P.M., (STR. 28) Greene started south toward Indian with his rail motor car pulling four empty man haul cars behind (STR. 27, 29). In the course of returning from Indian and after picking up members of the contractor's crew, including the plaintiffs, Greene's rail motor and man haul cars, while traveling in a northerly direction on a blind curve at mile 91.7 (TR. 408) collided

with "Alaska Railroad Passenger Extra 562 South" traveling toward Indian. The collision tragically resulted in injury to the plaintiffs and others of the contractor's crew and gave rise to this lawsuit.

III. QUESTIONS INVOLVED.

Appellee contends that the District Court for the Territory of Alaska, Third Division, correctly found that Harold D. Greene was, at the time of the collision involved in this case, an employee of an independent contractor and not of the appellee, that Greene, not being thus an employee of the appellee, the appellants had failed to establish that an employee or agent of the Alaska Railroad was negligent, that the conclusion of law whereby the sole approximate cause of the injuries of the appellants was other than the negligence of the appellee, and that said Harold D. Greene was employed by a government contractor within the meaning of Title 28, Section 2671 and therefore not an "employee of the government" within the meaning of the Act.

IV. SUMMARY OF ARGUMENT.

Appellants concede that under the Federal Tort Claims Act, liability can be predicated only upon the negligent act or wrongful omission of an "employee" of the United States (Appellants' Brief page 13). Nevertheless, appellants attempt to reach this conclusion by some undemonstrable alchemy based on non-

delegable duty under a railroad franchise, or on a lease or other relationship or possibly on the theory of dangerous instrumentality. Further while admitting that Harold D. Greene was employee of the contractor, appellants contend he was somehow the "special" employee of the defendant through "control" of Greene while he was operating on the tracks of the Alaska Railroad.

Appellee asserts that there is no non-delegable duty involved in that the Enabling Act of the Alaska Railroad (48 USCA 301-308; 49-3-1 ACLA 1949) authorizes the performance of acts necessary to facilitate carrying out the intent and purpose of the Congressional Enactment with the only charter obligations being to specifically operate the Alaska Railroad as a common carrier of freight and passengers. There is no lease or other delegation of charter or franchise powers involved. There is no authority for the proposition that the operation of the railroad is a "dangerous instrumentality" and further the United States has not consented to be sued on such a theory of imputed negligence.

Harold D. Greene was selected, hired and paid by the contractor. All of his duties were given and ordered by the contractor to be performed. The Alaska Railroad had no authority or control over Harold D. Greene. Although he was examined and approved by the Alaska Railroad Examiner as to his qualifications to operate a rail motor car, and while on the tracks of the Alaska Railroad he was required to conform to the railroad operating rules and proce-

dures, these however, carried no authority for Greene to operate any particular time nor directed him to go to any particular place but instead were promulgated for the protection and safety of the Alaska Railroad operations and property. Greene was not in any sense an employee of the appellee but instead was an employee of an independent contractor who was a "government contractor" within the meaning of Title 28, Section 2671 (28 USCA 2671) (62 Stat. 982, as amended).

V. ARGUMENT.

A. DEFENDANT IS NOT LIABLE FOR TORTS OF INDEPENDENT CONTRACTOR.

The appellants correctly state that generally a contractee is not liable for the torts of an independent contractor. However the appellants go on to assert that there are exceptions to the doctrine which insulates the contractee from the negligence of the independent contractor. The appellee asserts that these exceptions pertain to private corporations and concern remedial rights in respect of injuries caused by breaches of positive duties correlative to corporate franchises (see annotation in 28 ALR 122).

(1) Charter obligations.

Traditionally railroads have derived their powers from sovereign governments, and in the case of the Alaska Railroad, the Enabling Act (48 USCA 301-308; 38 Stat. 305; 49-3-1 ACLA 1949) specifically empowers the President of the United States "to do

all necessary acts and things in addition to those specifically authorized in said sections to enable him to accomplish the purpose and objects of said sections" (Sec. 307, Title 48; 38 Stat. 305). The purpose and objects referred to are obviously to operate the Alaska Railroad as a common carrier of freight and passengers (See Sec. 301, Title 48; 38 Stat. 305). This is the only *charter obligation* of the Alaska Railroad. A railroad is *not* liable for the torts of an independent contractor unless the enabling statute imposes on it the mandatory obligation of building the roads and performing related work, either expressly or by implication. The railroad may otherwise contract for such work and the contract is not a delegation of charter obligation. *Cunningham v. International Rail Co.* (1879) 51 Tex. 503, 32 Am. Rep. 632; *Sanford v. Pawtucket St. Rail Co.* (1896), 19 RI 537, 35 Atl. 67. Further the law is that a railroad is not liable for the acts of an independent contractor when the latter is not exercising any special franchise or charter power but is doing some act which could be done independently of the charter. *Atlanta & F. R. Company v. Kimberly*, 87 Ga. 161, 13 S. E. 227; *Boyd v. Chicago & N. R. Company*, 217 Ill. 332, 75 N. E. 496. Relief has been denied when the injury to the servant occurred while he was being carried on a train furnished by the railroad but operated by the independent contractor. *Scarborough v. Alabama Midland Co.* (1891), 94 Ala. 497, 10 So. 316. Further in this connection, the following is taken from *Hanna v. Chattanooga & Nashville R. Co.*, 88 Tenn. 310, 12 S. W. 718, at page 728 of the case as it is reported in 6 LRA 727:

“The plaintiff in his assignment of error insists that it was the duty of the Railroad Company to move its cars from one station to another, and that it could not devolve this duty upon another, so as to escape liability. This is a very correct rule, so far as applicable to a stranger who might have been injured by the cars, or to a passenger, on other cars, injured by the negligence of the persons thus permitted to take charge of the cars of the defendant Company, upon the principle, well established, that the Company owes a duty to the public, by reason of its franchises, from which it cannot absolve itself by turning over its road, or the management of its trains thereon, to others, whether corporations or individuals, without legislative sanction and exemption. But this rule does not apply in favor of the parties themselves who receive from the Company their cars with the understanding and agreement that they are personally to move or operate them for themselves or for their employer. In such case, the Company assumes no duty and no contract relation towards the parties so put in possession of the cars, except the duty to furnish sound and safe cars.”

The cases to which the appellants refer in this category involve *private* railroad companies who have applied for and secured a charter from a state thereby undertaking and assuming certain duties and obligations by virtue of such charter. These cases hold that by asking for and receiving the franchise, the railroad corporation comes under obligation to answer in damages to anyone who may be injured by any negligence in the use of the privileges it has so received.

The individual states have many statutes and regulations spelling out the non-delegable duties of charter railroads. There are a number of reasons why this interesting body of law has no application whatever to the instant case: 1) The Alaska Railroad is not a privately owned chartered railroad but is rather an instrumentality and arm of the executive branch United States Government; 2) There are no statutes or regulations defining the powers or obligations of the Alaska Railroad, except for the Act of Congress under which the Alaska Railroad was purchased, which Act gave to the President complete discretion to operate the same; 3) There is, as a matter of law, no discoverable limitations upon the power of the Federal Government to contract for the performance of its proprietary functions by an independent contractor. None of the authorities suggested by the appellants hold that the Government does not have the power to entrust any given proprietary function to an independent contractor; 4) The Enabling Act, 48 USCA 301-308 does not impose a mandatory exclusive obligation upon the Alaska Railroad to personally construct the railroad and to perform other functions unrelated to the franchise obligation of carrying passengers and freight as a common carrier; 5) There is no showing that the function of carrying out the "rehabilitation program for the Alaska Railroad" is a delegation of Alaska Railroad's franchise or charter obligation.

In connection with the delegation of duties under a charter or franchise, the appellants have cited several

cases which fall under the category under discussion, to-wit, *Liberty Highway Company v. Callahan*, 157 N. E. 708, and *International-Great Northern Railway Company v. Lucas*, 70 S. W. (2d) 226. The *Liberty* case involved the delegation of a highway freight carrier's duties to a third person who inflicted the injury on the plaintiff's intestate. The case is not in point and can be distinguished from the instant case for the reason that Harold D. Greene was not performing duties for the Alaska Railroad. The *International-Great Northern Railway Company* case is not in point because (1) the plaintiff was himself one of the contractors, and not an employee; (2) the track car upon which the plaintiff was riding was admittedly operated by a railroad employee; (3) the defendant railroad agreed to furnish transportation for the contractor as a part of the consideration for the contract in question.

(2) No lease arrangement involved.

Appellants have made several references in their brief to the responsibility of a railroad for the torts of its lessee (Appellants' Brief pages 14 and 15). The record is wholly silent regarding any lease agreement or arrangement between the contractor and the Alaska Railroad pertaining to the contractor operating upon the railroad's tracks. The appellants' reliance upon authorities involving a lease is therefore faulty. No general statement can be made regarding liability under such a situation for the reason that any one of many factors may control, e.g., lease with authority, lease without authority, lease, franchise or otherwise.

One accepted treatise points out that a lease of a railroad means *transfer of control*, distinguished from a contract for the use of tracks where the railroad retains control and can fulfill its franchise duty. *Elliot on Railroads*, 3d Ed., Secs. 411-414, 514. Appellants have relied upon the case of *Chicago, Burlington & Quincy Railroad v. Willard*, 220 U. S. 413. However, this case can be easily distinguished and is not employed because (1) the lessor had leased its entire railroad for a period of 99 years, (2) the case was decided under a specific Illinois statute for which there is no counter-part applicable to Alaska Railroad, (3) the person killed was apparently a member of the public and not an employee of either company. Further the Appellants have relied upon another case, *Midland Valley R. Co. v. Toomer*, 162 Pac. 1127-30, which is distinguishable for the reason that the motor car in question was being operated as a train, that the plaintiff was an ordinary passenger for hire and not an employee of any contractor, that the services of the motor car were available to and were used by the public at large, and further that the defendant was a privately owned and chartered railroad company.

In the instant case the Alaska Railroad never entered into a lease of its tracks with the contractor, never surrendered control of any phase of operation pertaining to the movements of its trains (e.g., Enabling Act or charter obligations) nor did the Alaska Railroad create the impression expressly or impliedly that the contractor could exercise control of any part or portion of the "franchise obligation" of Alaska

Railroad to carry passengers and freight. On their face, the cases cited by the Appellants involving a lease situation are irrelevant and immaterial.

(3) The relationship of licensee.

The Appellants have erroneously emphasized a motor car rental agreement (Plaintiffs' Exhibit No. 1) between Alaska Railroad and Morrison-Knudsen Co., Inc. (and not the contractor) which was entered into at an earlier date for a different purpose (TR. 441, 449, 450, 452). Regardless, the contractor had the right to use the Alaska Railroad tracks between Potter and Indian (TR. 96, 127, 131) in the course of its performance of the contract (Defendant's Exhibit BB). Therefore, considering the contractor as a licensee, the law does not furnish the assistance which the Appellants desire. It is held that the licensor is not responsible for the injuries resulting from the negligent operation of trains by the servants of the licensee *Central of Georgia Rail Co. v. Bessinger* (1916), 17 Ga. App. 617, 87 S. E. 920. Similarly, the licensor is not liable for the negligence of the employees of the licensee, 74 Corpus Juris Secundum 895, Sec. 364, b. The same result has been reached in the case where the liability of the lessor was denied for the reason that the Railroad Company cars were received with the understanding that they were to be personally moved and operated by the persons involved or their employer. *Hanna v. Chattanooga & N. R. Co.*, supra (88 Tenn. 318, 12 S. W. 718). In the instant case the transportation involved was that of the contractor's crews

in the performance of the contract, for which the contractor was being paid by the Alaska Railroad. Harold D. Greene was therefore engaged in the business of the contractor and not that of Alaska Railroad.

(4) Dangerous instrumentality.

Appellants have included in the case upon which they rely certain ones that involve the theory of "dangerous instrumentality". Such are the cases of *American Pacific Whaling v. Kristensen*, 93 Fed. (2d) 17; and *Doll & Sons v. Rebetti*, (3 CCA) 203 Fed. 593. This is a form of "imputed" negligence and illegal fiction converting an independent contractor relationship into a principal-agent relationship, in order to accomplish its purpose. It is submitted, however, that the defendant is not liable under the Federal Court Claims Act on "imputed" negligence. The case of *United States v. Hull*, 195 Fed. (2d) 64, is in point and the following is taken from page 67 thereof:

"Thus, in certain cases, under local law a private person may be liable without fault for injuries resulting from properly conducted activities deemed 'ultrahazardous'. Restatement of Torts Sec. 519. But the United States would not be subject to suit on such a liability, for under 28 U.S.C. Sec. 1346 (b), the United States has consented to be sued only where the injury was 'caused by the negligent or wrongful act or omission' of some employee of the government while acting in the scope of his office or employment."

The foregoing was cited with approval in the case of *Dalehite v. United States*, 346 U. S. 15, 73 S. Ct. 956,

97 L. Ed. 1427, where on pages 44 and 45 of 346 U. S., the following is stated:

“Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that* doctrine. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an ‘inherently dangerous commodity’ or property, or of engaging in an ‘extrahazardous’ activity. *United States v. Hull* (CA 1st Mass.) 195 F 2d 64, 67.”

Attention is called to the case of *Humble Oil & Refining Co. v. Bell, et al.* (Tex. Civ. App.), 180 SW (2d) 970, where, on page 975, the Court stated that an employee of an independent contractor does not come within the class of third persons included in the rule which is to the effect that the employer may be held liable to a third person for negligence of the independent contractor in the performance of inherently dangerous work. Further, on page 976 of 180 SW (2d) the Court cited authorities for the proposition and stated that an employer owes no duty to exercise ordinary care to protect the servant of the contractor from the risks arising from the negligence of the contractor. The same rule is cited with approval in the subsequent case of *Texas Electric Service Co. v. Holt*, 249 SW (2d) 662.

In the instant situation the answer to the “inherent or intrinsic dangerous instrumentality” cases is found

in the facts themselves. It is obvious that the simplest precaution taken by Greene, e.g., flagging around the curve on which the collision occurred, would have prevented the collision.

**B. HAROLD D. GREENE WAS NOT THE
APPELLEE'S EMPLOYEE.**

The Appellants have asserted that Harold D. Greene, while on the tracks of the Alaska Railroad, was the Appellee's employee by reason of the "control" exerted by Alaska Railroad. Factually, this position cannot be sustained by the Appellants.

Greene was employed by the contractor (TR. 435, STR. 10, 11) who paid his salary (STR. 3). He was selected for the rail motor car operator's job by the contractor's project manager (TR. 435, 448). All of Greene's work orders, directions and instructions to proceed with his rail motor car were given by the contractor, principally by delegation through the project manager (TR. 435, 436, 437). The Alaska Railroad never hired nor sent any motor car operators anywhere for the contractor (TR. 129). The rail motor cars and man haul cars involved were furnished by the contractor (TR. 436). There were no orders or other restrictions placed upon Greene by the Alaska Railroad in the use of the track between Potter and Indian except that he had been examined and approved as a motor car operator and was supposed to obey the rules and keep out of the way of the trains of the Alaska Railroad (TR. 436, 437) (TR.

18, 23, 24, 25, 57). The various rules and regulations adopted by the Alaska Railroad were in force for the purpose of the safety and protection of the Railroad's property and passengers (TR. 76). In the event of an infraction of these rules, Greene was not subject to be penalized by the Alaska Railroad as he did not work for the Railroad, but was only subject to disqualification as a rail motor car operator (TR. 88, 89, 90, 100). The "lineups" which carried Greene's name and operating area were not train or movement orders but were merely for information (TR. 92, 98) and conveyed no authority from the Railroad to operate.

The Appellants concede that Morrison-Kiewit-Birch are independent contractors in this instance. Certainly, the evidence supports this view (TR. 432, 433, 434, 435) (STR. 2, 3, 17-19) (Defendant's Exhibit BB). But the Appellants attempt to persuade the Court that in one respect, out of the many phases of work in which Greene participated, he, in that one respect became the employee and servant of the Appellee. For this the Appellants rely upon the words "right of control". Since the question involves statutory construction of a federal law, the Federal Courts are not bound by local decisions but may apply their own standards. *U. S. v. Sharpe*, 189 Fed. (2d) 239 and cases cited on page 241 thereof. The Appellants for purposes of strengthening their case quote from *Matcovich v. Anglin*, 134 Fed. (2d) 834, but the facts of that case demonstrate that the facts of the instant case do not warrant the Court finding that the

Appellee had any "control" as such over Harold D. Greene. The Appellants rely upon *Denton v. Yazoo and M. V. R. Company*, 284 U. S. 305, but again the facts of that case do not help the Appellants but, instead, show that the Railroad porter involved therein was actually engaged in performing the duties of the government, under governmental supervision, and hence was held properly to be an agent of the government. Further, the Appellants cite the case of *State of Maryland v. Manor Real Estate & Trust Co.*, 176 Fed. (2d) 414, but the only holding of this case was that the evidence showed the person in charge of the management of the property in question was not an independent contractor and therefore his employee was an agent of the government. Further, there was a statutory duty involved.

Appellants have cited the case of *Standard Oil Co. v. Parkinson*, 152 Fed. 681, but the quoted excerpt strengthens the Appellee's position since it is pointed out that in order to have the relationship of master and servant, the employer must have the right to direct and control the method and manner in which the work is done and *the result to be accomplished*. The following is taken from the case of *Standard Oil Co. v. Anderson*, 212 U. S. 215, where, on pages 220 and 221 the Court said:

"It will aid somewhat in the ascertainment of the true test for determining this question to consider the reason and extent of the rule of a master's responsibility. The reason for the rule is not clarified much by the Latin phrases in which it is sometimes clothed. They are rather

restatements than explanations of the rule. The accepted reason for it is that given by Chief Justice Shaw in the case of *Farwell v. Boston & Worcester Railroad Corporation*, 4 Metcalf, 49. In substance, it is that the master is answerable for the wrongs of his servant, not because he has authorized them nor because the servant in his negligent conduct represents the master, but because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. It is said in that case that this is a 'great principle of social duty,' adopted 'from general considerations of policy and security.' But whether the reasons of the rule be grounded in considerations of policy or rested upon historical tradition, there is a clear limitation to its extent. *Guy v. Donald*, 203 U. S. 399, 406. The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it."

The Appellants insist that the "qualification" of Greene as a rail motor car operator worked some magic. Actually, Plaintiffs' Exhibit 5 shows on its face, in so many words that Greene passed the Rules Examination and was qualified as a rail motor car operator for Morrison-Knudsen Co., Inc. There is not a word to the effect that he was an operator for the Alaska Railroad. Attention is called to the case of *Salmon v. Kansas City*, 241 Mo. 14, 145 SW 16, 39 LRA (NS) 328. In this case the plaintiff attempted to persuade the Court that an independent contractor for the construction of sewers in Kansas City was not

an independent contractor as to one phase of the operation, that is, blasting. The plaintiff, who was an employee of the independent contractor and was injured when an unexploded shot went off near where he was working, attempted to recover against the City for his injuries. The contention that the relationship of principal and agent subsisted between the City and the contractor as to the blasting operation, was based on the pertinent fact that the City reserved and assumed control over the blasting. The contract did reserve to the City's engineer large powers of supervision and control, not only as to materials but as to the method and mode of construction. However, the Court pointed out on page 335 of the report of the cases in 39 LRA (NS), as follows:

“Obviously, however, these powers are reserved to protect the interests of the city, and not in the interest of the contractor or his servants, nor for their protection. Neither the contractor nor his servants would have ground for complaint should the city fail to exercise such power of supervision. The engineer assumed no duty to plaintiff by the terms of the contract.”

The Court refused to hold that the independent contractor could be converted into an agent of the City as to blasting operations by such provisions as mentioned above.

The Appellants also make a point of the fact that following the collision, Alaska Railroad officials informed the contractor that Greene was no longer qualified to operate a gas car on its tracks. The Appellants contend that this converts Greene into an agent of the

Appellee. There is ample law on this point to the effect that control of the employment and discharge of workmen by the contractee does not in itself convert the contractor from an independent contractor into an agent or employee of the contractee. See annotation in 20 ALR 684, at page 769, and the many cases cited in note 1. The above mentioned case of *Salmon v. Kansas City* is also authority to the effect that the right to require the discharge of an incompetent workman is a privilege retained by the contractee for its own protection (see page 335 of the reported case in 39 LRA (NS)). The following is taken from the Washington case of *Engler v. Seattle*, 40 Wash. 72, where, on page 80, the Supreme Court of the State of Washington stated:

“On the other hand, conceding to him the right to discharge employees of Ryan & Company, still they were independent contractors. *Rogers v. Florence R. Co.*, supra; *Hobbit v. London, etc. R. Co.*, 4 Exch. 253; *Cuff v. Newark, etc. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205. In *Hobbit v. London etc. R. Co.*, the court says:

“ ‘Our attention was directed during the argument to the provisions of the contract, whereby the defendants (the Railway Company) had the power of insisting on the removal of careless or incompetent workmen, and so it was contended they must be responsible for their non-removal. But this power of removal does not seem to us to vary the case. The workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal if they thought him careless or unskillful, did not make him their servant.’ ”

VI.

CONCLUSION.

The appellants have failed to sustain the burden of proof as required by law, (*Watt v. U. S.*, D.C.E.D. Ark. 123 Fed. Supp. 906, 911), that Harold D. Greene, was, at the time of the accident which gave rise to this action, an employee of the United States within the meaning of the controlling statute, 28 USCA Sec. 1346(b). They have tried to avoid this burden by indirection and fallacy. To be specific they cite cases to show the railroad is liable for the torts of a lessee but fail to establish the existence of a lease (for the reason there is none); they refer to liabilities of the railroad on the theory of its being a dangerous instrumentality without the citation of authority in point; they suggest that the railroad is "strictly liable" without proof of fault when the law is settled to the contrary under the provisions of Title 28, Section 1346(b) (*Dalehite v. U. S.*, 346 U. S. 15, 73 Supreme Court 956); they repeatedly allege that "control" of an individual is determinant of the master-servant relationship while ignoring an equally important factor of whose business the servant was about at the time in question.

In lieu of sustaining the burden of proof as required by law, appellants have made a brazen attempt to create the impression (by emphasizing a so-called indemnity clause, Appellants' Brief, page 26) that the defendant United States of America if held liable by this Honorable Court, will be reimbursed by a third party.

The Alaska Railroad has not been shown to be the employer of Harold D. Greene. The Alaska Railroad

lawfully contracted with certain independent contractors for whom Greene was working at the time of the accident. The right to control the result of such work performed (in this case the subject matter of contractors' contract) is not sufficient to make the independent contractor an "employee" of the government. *Hopson v. U. S.*, DC Ark. 1956, 135 Fed. Supp. 804. Even where the government retains the right of inspection to insure proper results, such does not amount to control as to the manner and method. *Strangi v. United States*, 211 Fed. Supp. 305, 307; *Harger v. Harger*, 144 Ark. 375, 222 S. W. 736.

The facts are apparent and the law is clear. The Federal Tort Claims Act requires a negligent act or omission of a Federal employee. This law is in derogation of sovereign immunity and should be strictly construed against the appellants. *Dalehite v. United States*, 346 U. S. 15; 73 S. Ct. 956, 97 L. Ed. 1427 and cases cited in footnote 22, page 30 of 346 U.S.). The appellants' theories should be examined in the light of applicable facts and ruling law, and when so examined the appellee respectfully submits that the Court below was correct and its decision should be affirmed.

Dated, Anchorage, Alaska,
January 16, 1957.

Respectfully submitted,
WILLIAM T. PLUMMER,
United States Attorney,
DONALD A. BURR,
Assistant United States Attorney,
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No. 14,922

IN THE

United States Court of Appeals
For the Ninth Circuit

GEORGE DUSHON, HAROLD RATHGEB, HILTON
DUKE, PETER J. VALLENTINE, NELS PIL-
SKOG, JOE MISZENCIN and THOMAS J.
GOLDEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
Territory of Alaska, Third Division.

REPLY BRIEF OF APPELLANTS.

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Subject Index

| | Page |
|--|------|
| I. Jurisdiction | 1 |
| II. Question involved | 2 |
| III. Specifications of error | 2 |
| IV. Definitions | 3 |
| V. Argument | 3 |
| A. Definition of the word "employee" | 3 |
| B. Authorities cited by appellee | 4 |
| C. The facts | 6 |
| D. The law | 6 |
| E. Railroadng hazardous | 7 |
| VI. Conclusion | 9 |

Table of Authorities Cited

| Cases | Pages |
|--|--------------|
| Dalehite v. U. S., 346 U.S. 15 | 8 |
| Denton v. Yazoo & M. V. R. Co., et al., 284 U.S. 305 | 4 |
| In re Brown, 159 N.Y.S. 1047 | 7 |
| Matcovich v. Anglim, 134 Fed. (2d) 834 | 3 |
| Missouri Railway Co. v. Mackey, 127 U.S. 205 | 7 |
| State of Maryland v. Manor Real Estate and Trust Co. et al., 176 Fed. (2d) 414 | 3 |
| Sullivan v. Atlantic Coast Line R. Co., 244 Fed. 606 | 7 |
| United States v. Sharpe, et al., 189 Fed. (2d) 239 | 4 |

| Codes | |
|---|------|
| New Title 28, U.S. Code, Section 2671 | 3 |
| Title 28, U.S.C.A., Section 1346(b) | 1, 2 |

| Rules | |
|--|---|
| Federal Rules of Civil Procedure, Rule 18-2(d) | 2 |

No. 14,922

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GEORGE DUSHON, HAROLD RATHGEB, HILTON
DUKE, PETER J. VALLENTINE, NELS PIL-
SKOG, JOE MISZENCIN and THOMAS J.
GOLDEN,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
Territory of Alaska, Third Division.

REPLY BRIEF OF APPELLANTS.

I.

JURISDICTION.

On pages 1 and 2 of Appellee's brief, statutes are cited "in amplification of the appellants' jurisdictional statement".

None of these cited statutes, except 28 U.S.C.A. 1346(b), pertain to the jurisdiction of the District Court for the Territory of Alaska to try the plaintiffs' case.

The trial Court had jurisdiction solely by virtue of the provisions of 28 U.S.C.A. 1346(b).

II.

QUESTION INVOLVED.

The only question involved in this appeal is as stated in appellants' brief:

“Whether or not Harold D. Greene, who was operating a track car with trailers connected, was, at the time of the collision, acting in the capacity of an ‘employee of the government’ as the term is used in Section 1346 (b) of New Title 28 U. S. Code, and as the term is defined in Section 2671 thereof.” (Brief of Appellants, III, pages 12, 13.)

III.

SPECIFICATIONS OF ERROR.

In accordance with Rule 18-2 (d), counsel for appellants have urged no error other than those set out in our specifications of error, in which the findings of the trial Court are specified as error.

As required by the Rule we have stated, as “particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous.” (Appellant's Brief IV, pages 13-14.)

IV.

DEFINITIONS.

“Federal agency”, as defined in Sec. 2671, New Title 28, U. S. Code, includes the Alaska Railroad, but does not include any contractor with the United States.

“Employee of the government” as defined in the same section includes employees of any Federal agency.

The word “employee” is not defined.

V.

ARGUMENT.

A.

DEFINITION OF THE WORD “EMPLOYEE”.

The argument of the United States Attorney is based upon the assumption that the word “employee” means a person hired, paid, and subject to discharge, by another.

The United States Attorney has not cited a single authority sustaining this assumption.

On the contrary, in our opening brief, we have cited Federal cases holding that the really essential element in determining the relation of master and servant is the right of control.

Matcovich v. Anglim, 134 Fed. (2d) 834. (Appellants’ Brief, page 19.)

State of Maryland v. Manor Real Estate and Trust Co. et al., 176 Fed. (2d) 414, Opinion 8. (Appellants’ Brief, page 20.)

Denton v. Yazoo & M. V. R. Co., et al., 284 U.S. 305, is also to the same effect.

B.

AUTHORITIES CITED BY APPELLEE.

Numerous decisions having to do with the relationship of an independent contractor and his contractee are cited and reviewed in the brief of appellee. The responsibility or non-responsibility of the contractee for injuries suffered by the employee of the independent contractor, all depending on the terms of the contract, are not relevant in this case, and none of the authorities cited are in point, but none of the cases cited by appellee repudiated, and nearly all recognized, the principle that right of control is determinative of whether or not the relationship of master and servant exists.

United States v. Sharpe, et al., 189 F. (2d) 239-242, is strongly relied upon in appellee's brief.

In that case, the Fourth Circuit reversed the decision of the trial judge, and held that liability could not be imposed on the master for the negligence of the servant in the operation of an automobile for the servant's purpose.

Discussing the doctrine, *respondeat superior*, the Court, on page 242 of the opinion, quotes with approval the following:

“This doctrine applies only when the relation of master and servant is shown to exist between the

wrongdoer and the person sought to be charged for the result of the wrong at the time and in respect to the very transaction out of which the injury arose.”

At the very time, and in respect to the very transaction out of which plaintiffs’ injuries arose, Harold D. Greene, the wrongdoer, whose negligence caused the collision, was subject to the control of the Alaska Railroad, a Federal agent of the defendant United States. Morrison-Knudsen could not tell him when to use the tracks of the Alaska Railroad; they could tell him where to go and for what purpose. They could not tell him, were not competent to tell him, and had no authority to tell him, how to operate the track car.

The relationship of master and servant did not and could not have existed between Morrison-Knudsen and Greene with respect to the manner in which he should operate the track car.

On the other hand, in his operation of the track car Greene, using the tracks of the Alaska Railroad with its permission, was subject, when using them, to their rules and regulations.

He was subject to the control of the management of the Alaska Railroad, of experienced and competent railroad men, else they would not have been employed by the United States to manage the railroad.

The relationship of master and servant did exist between the Alaska Railroad and Greene with respect to the manner in which he should operate the track car.

C.

THE FACTS.

The facts of this case are accurately stated in appellants' statement of the case, par. II, pages 2-12.

No material statement therein is disputed in the brief of appellee.

It is established that Harold D. Greene was under the control of the Alaska Railroad in his operation of the track car.

D.

THE LAW.

The law is exhaustively argued in appellants' brief, par. V, pages 15-34.

Counsel for appellants are not attempting to strain the meaning of the word "employee" to meet the exigencies of the occasion in order to invoke the remedy afforded by the Tort Claims Act.

If we were bound by the narrow definition applied by the United States Attorney, this action would never have been brought, but it has been demonstrated by unanimous authorities cited by appellants that, in all cases where the liability of the master for the tortious acts of the servant is involved, the question involved is who had the right of control.

E.

RAILROADING HAZARDOUS.

That railroading is a hazardous operation has uniformly been held by Court decisions and declared by state statutes.

The case of *Missouri Railway Co. v. Mackey*, 127 U.S. 205, holds:

“But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories. See *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512, 523; *Barbier v. Connolly*, 113 U.S. 27; *Soon Hing v. Crowley*, 113 U.S. 703.”

See also:

In re Brown, 159 N.Y.S. 1047;

Sullivan v. Atlantic Coast Line R. Co., 244 Fed. 606.

Notwithstanding the many safety devices, such as block signal systems, air-brakes, etc., which have been

invented and applied in recent years, railroading has continued to be hazardous. Safety precautions have not kept pace with accidents. Safety has been sacrificed to speed.

In the brief of appellee, pages 16-17, the case of *Dalehite v. U. S.*, 346 U.S. 15, is cited to the effect that liability does not arise by virtue of the United States engaging in an "extra hazardous activity".

This principle has never been disputed by appellants. We have never contended that the United States is liable in this case for any other reason than that the injuries suffered by appellants were caused by the negligence of an employee of the United States, while, with the permission of the Alaska Railroad, using its tracks.

On page 25 of appellee's brief, it is stated:

" . . . The Federal Tort Claims Act requires a negligent act or omission of a Federal employee. This law is in derogation of sovereign immunity and should be strictly construed against the appellants . . . "

The *Dalehite* case is again cited by appellee in support of the foregoing statement.

Evidently the United States Attorney is not aware that the *Dalehite* decision was reversed on January 28, 1957, by the Supreme Court of the United States.

Rayonier Incorporated, a Corporation, Petitioner v. United States of America; Arthur A. Arnhold, et al., Petitioners v. United States of America, Nos. 45, 47.

The case is reported in 77 Supreme Court Reporter, pages 374-378, 352 U.S.

In his opinion on page 377, Justice Black states:

“(3, 4) It may be that it is ‘novel and unprecedented’ to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government’s traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability . . .”

VI.

CONCLUSION.

1. In our specifications of error, the counsel for appellants have abandoned all the allegations of the complaint ascribing negligence to the defendant United States, except the allegation that the injuries suffered by appellants were caused by the negligence of an employee of the United States, one Harold D. Greene.

We have waived the allegations that the Alaska Railroad used a slip-shod method of giving information of train movements; that it had a defective air-brake system; that it was not equipped with modern safety devices, and the like.

2. There is but one question for this Appellate Court to decide, and that is whether or not Harold D. Greene was an employee of the defendant United

States at the time of the collision which caused the injuries of plaintiffs.

Appellants contend that he was, and support that contention by judicial decisions.

Appellee contends that he was not, and supports its contention by assertion.

Throughout the brief of appellee, the United States Attorney repeatedly begs the question.

In one assertion, the United States Attorney hits the nail on the head. On page 18 of his brief he states:

“... It is obvious that the simplest precaution taken by Greene, e.g., flagging around the curve on which the collision occurred, would have prevented the collision.”

Greene knew the Alaska Railroad train was in the vicinity, but thought he had time to beat it past the curve.

He was in a hurry.

3. In par. IV, page 7 of appellee's brief, it is stated that “appellants attempt to reach this conclusion by some undemonstrable alchemy based on non-delegable duty under a railroad franchise,” etc.

Perhaps we have been guilty of something of that sort. However, no alchemist wrote the brief of appellants.

We have attempted, not by undemonstrable alchemy, but by diligent legal research, to reach our conclusions.

It is submitted that the decision of the trial Court should be reversed.

Dated, Anchorage, Alaska,
March 11, 1957.

GEORGE B. GRIGSBY,
HAROLD J. BUTCHER,
Attorneys for Appellants.

No. 14,923

United States Court of Appeals
For the Ninth Circuit

MARTIN JIMENEZ,

Appellant,

vs.

BRUCE BARBER, District Director of
the Immigration and Naturalization
Service for the Thirteenth Immi-
gration District,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S OPENING BRIEF.

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FILE

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Subject Index

| | Page |
|--|------|
| Decision below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| The statutes involved..... | 2 |
| Statement of the case..... | 11 |
| Summary of argument..... | 15 |
| 1. The statute as construed and applied, or on its face, violates the guarantees of free speech and association and of due process of law in the First Amendment... | 15 |
| 2. As construed and applied, or on its face, the statute is a bill of attainder, prohibited by the Constitution of the United States in Article I, Section 9, Clause 3.... | 15 |
| 3. The statute is void for vagueness..... | 16 |
| 4. The Attorney General is not a necessary party..... | 16 |
| Argument | 17 |
| I. Violations of First Amendment guarantees..... | 17 |
| A. As construed and applied, the statute violates the guarantee of free speech and association..... | 17 |
| B. The use of secret evidence violates the guarantee of due process contained in the First Amendment | 25 |
| II. The statute is a bill of attainder..... | 26 |
| III. The statute as construed and applied is void for vagueness | 30 |
| IV. The attorney general is not an indispensable party.... | 35 |
| Summary | 37 |

Table of Authorities Cited

| Cases | Pages |
|--|----------------|
| American Communications Assn. v. Douds, 339 U.S. 382 . . . | 21, 25, 29, 30 |
| Burgess v. Salmon, 97 U.S. 381 | 28 |
| Chicago Housing Authority v. Blackman, 4 Ill.2d 319, 122 N.E.2d 522 | 15, 19 |
| Communist Party v. Peek, 20 Cal.2d 536 | 17 |
| Cummings v. Missouri, 4 Wall. 277 | 16, 27, 28 |
| Ex parte Fierstein, 41 F.2d 53 | 28 |
| Ex parte Garland, 4 Wall. 333 | 27 |
| Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583, 47 ALR 457 | 19 |
| Galvan v. Press, 347 U.S. 522 | 17, 28 |
| Garcia v. Landon, 99 L.Ed. 48 | 17 |
| Hannegan v. Esquire Inc., 327 U.S. 146 | 19 |
| In the Matter of K—, 2 I&N 838 | 22 |
| In the Matter of R—, 3 I&N 532 | 23 |
| Jay v. Boyd, 222 F.2d 820 | 26 |
| Jordan v. de George, 341 U.S. 223 | 16, 30 |
| Kessler v. Strecker, 95 F.2d 976, 96 F.2d 1020, aff. 307 U.S. 22 | 28 |
| Lawson, Jr., et al., v. Housing Authority of the City of Milwaukee, 270 Wis. 269, 70 N.W.2d 605 | 18, 21 |
| Mahler v. Eby, 264 U.S. 32 | 16, 27 |
| Parker, et al. v. Lester, et al., F.2d (9 Cir., Oct. 1955) | 15, 25, 26 |
| Peters v. Hobby, 349 U.S. 331 | 26 |
| Shaughnessy v. Pedreiro, 349 U.S. 48 | 16, 35 |
| United States v. Lovett, 328 U.S. 303 | 16, 27 |
| Wieman v. Updegraff, 344 U.S. 183 | 16, 20, 28 |
| Williams v. Fanning, 332 U.S. 490 | 17 |

Constitutions

United States Constitution:

| | |
|-------------------------------------|---------------------------|
| First Amendment | 2, 15, 17, 21, 22, 24, 25 |
| Article I, Section 9, Clause 3..... | 15 |

Statutes

| | |
|---|--------|
| 8 CFR, Section 150.10..... | 11, 35 |
| Immigration Act of Oct. 16, 1918, as amended, 40 Stat. 1012, 8 USC Section 137..... | 2, 7 |
| Immigration Act of 1917, as amended, 8 USC Section 155.. | 12 |
| Immigration Act of 1917, as amended by the Act of June 28, 1940, Title 2 (54 Stat. 671)..... | 2, 14 |
| Section 19(a) | 34 |
| Immigration and Nationality Act of 1952, subsection 5, Sec- tion 1254(a) of 8 USC..... | 22 |
| Independent Offices Appropriations Act of 1953, "Gwinn Amendment", Public Law 455, 82nd Congress, 66 Stat. 403, 42 USC Section 1411(c)..... | 18 |
| 5 USC Section 1009..... | 2 |
| 28 USC Section 1294..... | 2 |
| 28 USC Sections 1331, 1346(a), 2201 and 2202..... | 2 |
| 50 USCA Section 786..... | 32, 34 |
| Statute 1 George I, Chapter 13..... | 28 |
| Statutes 9 and 10 William III, Chapter 32..... | 28 |

Texts

| | |
|--|----|
| 1 Stephen, History of the Criminal Law of England, pages 480 and 481..... | 28 |
|--|----|

No. 14,923

United States Court of Appeals For the Ninth Circuit

MARTIN JIMENEZ,

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vs.

BRUCE BARBER, District Director of
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Service for the Thirteenth Immi-
gration District,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S OPENING BRIEF.

DECISION BELOW.

The decision below is unreported. The District Court granted the respondent's motion to dismiss on August 29, 1955 (R. 18). (The order to dismiss by evident inadvertence refers to "plaintiff's motion to dismiss." The only motion to dismiss in the record, however, is the defendant's, and it is clearly this motion which the Court intended to grant.) No opinion was filed by the District Court.

JURISDICTION.

The jurisdiction of this Court is conferred by 28 USC §1294. Jurisdiction below was conferred by 28 USC §§1331, 1346(a), 2201 and 2202, and 5 USC §1009.

QUESTIONS PRESENTED.

The questions which arise here require an interpretation of the Immigration Act of 1917, as amended by the Act of June 28, 1940, Title 2, 54 Stats. 671, and the Act of Oct. 16, 1918, as amended, 40 Stat. 1012, 8 U.S.C. § 137.

1. Does the statute on its face or as construed and applied violate the guarantees of free speech and association, and the due process clause of the First Amendment?

2. Is the statute, on its face or as construed and applied, a bill of attainder?

3. Is the statute void for vagueness?

4. Are the Attorney General of the United States or the Commissioner of Immigration and Naturalization necessary parties?

THE STATUTES INVOLVED.

The Immigration Act of 1917, as amended by the Act of June 28, 1940, Title 2 (54 Stat. 671):

“Sec. 19. (a) That at any time within five years after entry, any alien who at the time of

entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed, by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or protects or promises to

protect from arrest any prostitute; any alien who shall import or attempt to import any person for the purpose of prostitution or for any other immoral purpose; any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the provisions of section four hereof; any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner of Immigration and Naturalization, or at any time not designated by immigration and naturalization officials, or who enters without inspection, shall, upon the warrant of the Attorney General, be taken into custody and deported: *Provided*, That the marriage to an American citizen of a female of the sexually immoral classes the exclusion or deportation of which is prescribed by this Act shall not invest such female with United States citizenship if the marriage of such alien female shall be solemnized after her arrest or after the commission of acts which make her liable to deportation under this Act: . . . *Provided further*, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable

to the classes of aliens therein mentioned irrespective of the time of their entry into the United States: *Provided further*, that the provisions of this section shall also apply to the cases of aliens who come to the mainland of the United States from the insular possessions thereof: *Provided further*, That any person who shall be arrested under the provisions of this section, on the ground that he has entered or been found in the United States in violation of any other law thereof which imposes on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported to the place specified in such other law. In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final.

(b) Any alien of any of the classes specified in this subsection, in addition to aliens who are deportable under other provisions of law, shall, upon warrant of the Attorney General, be taken into custody and deported:

(1) Any alien who, at any time within five years after entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.

(2) Any alien who, at any time after entry, shall have on more than one occasion, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien or aliens to enter or to try to enter the United States in violation of law.

(3) Any alien who, at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun.

(4) Any alien who, at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940.

(5) Any alien who, at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940. . . .

(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. . . .

(d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of October 16, 1918 (40 Stat. 1008; U.S.C., title 8, sec. 137), entitled 'An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes', as amended; (2) the Act of May 26, 1922, entitled 'An Act to amend the Act entitled "An Act to prohibit the importation and use of opium for other than medicinal purposes," approved February 9, 1909, as amended' (42 Stat. 596; U.S.C., title 21, sec. 175); (3) the Act of February 18, 1931, entitled 'An Act to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics', as amended (46 Stat. 1171; U.S.C., title 8, sec. 156a); (4) any of the provisions of so much of subsection (a) of this section as relates to criminals, prostitutes, procurers, or other immoral persons, the mentally and physically deficient, anarchists, and similar classes; or (5) subsection (b) of this section."

* * * * *

The Act of October 16, 1918 (40 Stat. 1012, as amended, 8 U.S.C. 137):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

(1) Aliens who seek to enter the United States whether solely, principally, or incidentally, to engage in activities which would be

prejudicial to the public interest, or would endanger the welfare or safety of the United States;

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

(A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;

(D) Aliens not within any of the other provisions of this paragraph (2) who advocate the economic, international, and governmental doctrines of world communism or the economic and governmental doctrines of any other form of totalitarianism, or who are members of or affiliated with any organization that advocates the economic, interna-

tional, and governmental doctrines of world communism, or the economic and governmental doctrines of any other form of totalitarianism, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of such organization; . . .

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating (i) the overthrow by force or violence or other unconstitutional means of the Government of the United

States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the economic and governmental doctrines of any other form of totalitarianism.

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subparagraph (G)....

Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1(1) or section 1(3) of this Act or (except in the case of an alien who is legally in the United States temporarily as a non-immigrant under section 3(1) or 3(7) of the Immigration Act of 1924, as amended) a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of

February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

STATEMENT OF THE CASE.

The plaintiff Martin Jimenez, who is the appellant here, is a citizen of the Republic of Mexico who since 1928 has resided continuously in the United States. He is now 53 years of age, married to a naturalized citizen of the United States, and has for many years past been and now is employed in San Francisco as a warehouseman.

The respondent Bruce Barber is the District Director of Immigration and Naturalization for the Thirteenth Immigration District with offices located in San Francisco. He is charged with the execution of the immigration and naturalization laws of the United States in this District, and particularly with the carrying out of orders of deportation (8 CFR §150.10).

On January 2, 1940, the Immigration and Naturalization Service issued a warrant for appellant's arrest. On May 29, 1951, appellant was arrested and charged with being in the United States in violation of the Immigration Act of 1924, in that at the time of entry he was not in possession of an unexpired immigration visa. Thereafter, hearings were held on the warrant charge.

During the course of the hearing, appellant applied for suspension of deportation under the terms of the

Immigration Act of 1917, as amended, 8 USC §155. This statute insofar as relevant is printed in this brief, *supra*. On August 14, 1952, the Hearing Officer recommended that appellant be deported from the United States for illegal entry and that his application for suspension of deportation be denied. Appellant appealed this decision to the Board of Immigration Appeals. That Board on March 9, 1954, dismissed the appeal. This action was thereafter instituted to secure court review of the action of the immigration authorities, and an injunction against the execution of the deportation order unless and until appellant's application for suspension of deportation has been properly entertained and acted upon.

The complaint alleged the facts just set forth (R. 3-5), and further facts which will be related below. To the complaint the Government interposed a motion to dismiss on the grounds that the complaint failed to state a claim upon which relief can be granted; that the Court lacked jurisdiction of the subject matter and of the person of an indispensable party, the Attorney General of the United States; and that the complaint failed to join an indispensable party, the Attorney General of the United States (R. 14). This motion was granted without opinion (R. 18). The entire record consists therefore of the complaint, the motion to dismiss the complaint, and the order of the Court granting that motion.

The complaint alleged that appellant was eligible for suspension of deportation. The facts alleged are that he has been a resident of the United States for

more than seven years prior to his application for suspension of deportation, and had been for the five years preceding that application a person of good moral character (R. 6). It was further pleaded (R. 9-10) that his eligibility for suspension was grounded upon the additional fact of the serious economic detriment that would be suffered by his spouse, a citizen of the United States, in the event of his deportation.

It is further alleged in the complaint that the only ground upon which plaintiff's deportation was sought was his illegal entry into the United States in 1928. At no time was plaintiff charged with membership in the Communist Party of the United States, the Communist Political Association, or any other organization. In fact it affirmatively appeared by the statement of the Hearing Officer at the deportation hearing that no accusation of membership in any organization was made against the appellant (R. 5-6). Nevertheless, the Immigration Service decided that appellant was not eligible for suspension of deportation because of his refusal to answer questions about his membership in or affiliation with certain organizations, including the Communist Political Association and the Communist Party.

His refusal to answer these questions at first included the period during which he was required to establish good moral character, that is, for the 5 years preceding his application for suspension of deportation. Subsequently, however, appellant modified his position on this question and offered, if the case before the administrative agency could be reopened, to

testify in answer to questions regarding such membership or affiliation for that 5 year period. The application to reopen the cause for the purpose of answering such questions was denied by the Board of Immigration Appeals on March 22, 1955, on the ground that this would be insufficient to establish appellant's eligibility for suspension of deportation (R. 6, 7).

The refusal to exercise the discretion vested in the Attorney General of the United States to grant or deny suspension of deportation was sought to be justified by the theory that the statute under which suspension was sought, that is, the Act of June 28, 1940, 54 Stat. 671, required plaintiff in the circumstances here presented to establish that he was not at any time a member of that group or class made ineligible for suspension of deportation by the statute, and specifically that he was not and never had been since his entry a member of the Communist Political Association or the Communist Party of the United States (R. 7).

The complaint alleged that appellant was informed and believed and on information and belief alleged that the denial of suspension of deportation in his case was in part based upon secret information contained in the file of the Immigration and Naturalization Service, which information was not disclosed to plaintiff but was disclosed to and known by those officials of the Immigration Service who recommended or sustained the recommendation that suspension of deportation be denied.

The first cause of action set forth the facts upon which appellant relied for his prayer for injunctive relief. In a second cause of action he set forth the same facts, and asked for a declaration that the denial of his application for suspension of deportation and the deportation order against him are null and void.

SUMMARY OF ARGUMENT.

1. The statute as construed and applied, or on its face, violates the guarantees of free speech and association and of due process of law in the First Amendment.

The holding out of a privilege by an agency of the Government upon condition of non-membership in certain organizations violates the guarantees of freedom of speech and association. To require assurances of such non-membership is therefore also a violation of those guarantees. *Lawson, Jr., et al. v. Housing Authority of Milwaukee*, 270 Wis. 269, 70 N.W.2d 605; *Chicago Housing Authority v. Blackman*, 4 Ill.2d 319, 122 N.E.2d 522.

The use of secret evidence, consisting of statements by persons with whom the accused is not confronted, violates the guarantee of due process of law. *Parker, et al. v. Lester, et al.*, F.2d (9 Cir., Oct. 1955).

2. As construed and applied, or on its face, the statute is a bill of attainder, prohibited by the Constitution of the United States in Article I, Section 9, Clause 3.

The statute inflicts civil punishment by legislative fiat, without judicial or other trial, upon persons who are members of organizations named in the statute.

United States v. Lovett, 328 U.S. 303; *Mahler v. Eby*, 264 U.S. 32; *Cummings v. Missouri*, 4 Wall. 277. Membership alone punishes. *Wieman v. Updegraff*, 344 U.S. 183. Only acceptance of the proposition that membership in named organizations, without more, is sufficient to disqualify an applicant for suspension of deportation makes the questions regarding such membership relevant to consideration of an application for suspension of deportation. Hence the denial of suspension because of failure to answer questions regarding such membership or affiliation must fall with the statute and for the same reasons.

3. The statute is void for vagueness.

To require appellant to establish that he is not a member of any class declared ineligible for suspension of deportation by the relevant statute is to impose an impossible burden. The terms of the statute are so vague and ill defined that no man can know, much less establish by evidence, whether he is or is not within the classes excluded from the benefits of suspension of deportation. A deportation statute, like a criminal statute, may be void for vagueness. *Jordan v. de George*, 341 U.S. 223.

4. The Attorney General is not a necessary party.

The question of necessary parties is determined on practical considerations. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 54. Since the District Director executes deportation orders, an injunction restraining him from carrying out the deportation order until the requirements of the law have been met will adequately afford

appellant complete relief. *Williams v. Fanning*, 332 U.S. 490.

ARGUMENT.

I. VIOLATIONS OF FIRST AMENDMENT GUARANTEES.

A. As construed and applied, the statute violates the guarantee of free speech and association.

As construed by the Immigration Service, the statute under which appellant applied for suspension of deportation requires in addition to the express conditions of eligibility set forth in sub-section (c) (2), that appellant affirmatively establish that he is not and has never been since his entry into the United States a member of certain proscribed organizations (R. 7). Those organizations include the Communist Party and the Communist Political Association.

The organizations are identified by name alone. Nothing is said in the statute, nor is any evidence required by the Service about their nature, aims or objectives. Their legality or illegality (cf. *Communist Party v. Peek*, 20 Cal.2d 536) is immaterial. Knowledge of their aims is not required. If those organizations are now, or were at any time subsequent to the alien's entry into the United States lawful organizations, or engaged in any lawful pursuits, this is no excuse for membership in them. If the alien's membership or affiliation was limited in purpose to obtaining the necessities of life, membership is nonetheless ground for denial of discretionary relief. Cf. *Galvan v. Press*, 347 U.S. 522; *Garcia v. Landon*, 99 L.Ed. 48.

The effect of this construction of the statute is therefore to allow suspension of deportation only on condition that the applicant shall have refrained from exercising his constitutional right to freedom of speech and association.

Governmental action of exactly the same sort has been considered recently by the Supreme Court of Wisconsin and of Illinois in *Lawson, Jr., et al., v. Housing Authority of the City of Milwaukee*, 270 Wis. 269, 70 N.W.2d 605. The Supreme Court of Wisconsin considered the application of the so-called "Gwinn Amendment" to the Independent Offices Appropriations Act of 1953, Public Law 455, 82nd Congress, 66 Stat. 403, 42 USC §1411(c). That amendment provided that no housing unit constructed with federal funds should be occupied by a person who is a member of an organization designated as subversive by the Attorney General. The defendant Housing Authority in Milwaukee adopted a resolution, numbered 513, providing that leaseholders were required to execute a certificate of non-membership in such organizations as a condition of continued tenancy.

The plaintiffs in that case belonged to an organization listed by the Attorney General. They refused to sign the certificate of non-membership but tendered rent to the Authority for their apartment. The rent was refused and returned to them, and they were notified that they must vacate the premises. They filed an action in the state courts seeking a declaration and the Gwinn Amendment was invalid and unconstitutional. The Supreme Court of Wisconsin found that

the resolution was unconstitutional and void because it violated the provisions of the First Amendment. The Court cited *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 47 ALR 457, and *Hannegan v. Esquire Inc.*, 327 U.S. 146. It quoted from the last named case at p. 156, where the Supreme Court said:

“But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *United States ex rel. Milwaukee Social Democrat Publishing Co. v. Burleson*, 255 U.S. 407, 421-423, 430-432, 437, 438, 41 S.Ct. 352, 357, 358, 360, 361, 363, 65 L.Ed. 704. *Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated.* (Italics supplied.)”

In *Chicago Housing Authority v. Blackman*, 4 Ill. 2d 319, 122 N.E.2d 522, the Supreme Court of Illinois reached the same conclusion as the Supreme Court of Wisconsin. The question was raised whether the oath required of the tenants of federally supported housing projects by the Chicago Housing Authority, under the Gwinn Amendment, was constitutional. The Housing Authority pointed out that they could evict tenants who refused to sign the oath by giving them a 15-day notice to quit. The Court said:

“The argument, in other words, is that because the tenants have no legal right to occupy the

housing accommodations, they cannot be deprived of any constitutional right by the requirements in question. The position is untenable. A similar contention was rejected in *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 219, 97 L.Ed. 216; where State employees were required by statute to take an oath concerning their affiliation with certain proscribed organizations, as a condition of continued employment. The court held that statute invalid . . .

A like conclusion must follow in the present case. Even though appellants have no right to remain as tenants of appellee, they may not, as a condition of continued occupancy, be required to comply with unconstitutional requirements."

The Court pointed out that appellants had not alleged membership in any subversive organization, but held that they still had standing to challenge the oath requirements because the grounds for their eviction was not membership in an organization, but refusal to take the oath. That case is thus on all fours with the case at bar. Governmental withholding of a privilege was there based upon a requirement that those seeking the privilege must establish non-membership in organizations. Upon the authority of *Wieman v. Updegraff* the Supreme Court of Illinois held the Gwinn Amendment and the oath requirement unconstitutional and void.

There is no need to labor the point. A statute or regulation by which a governmental agency withholds a privilege unless the applicant for the privilege establishes that he has not exercised certain constitu-

tional rights protected by the First Amendment, infringes First Amendment rights.

It may be argued that *American Communications Assn. v. Douds*, 339 U.S. 382 has so altered our basic law on First Amendment rights that this infringement of those rights is allowable. In the *Lawson* case, *supra*, the Supreme Court of Wisconsin considered the effect of the *Douds* decision. It pointed out that in that case Congress had found the danger to commerce from the likelihood of political strikes. Commenting on the application of that decision to the Gwinn Amendment, the Court said:

“It is beyond our power to comprehend how the evil which might result from leasing units in a federally aided housing project to tenants who are members of organizations designated subversive by the Attorney General is in any way comparable in substantiality to that which would result to the general welfare through communists in control of labor organizations disrupting commerce by calling strikes to carry out Communist Party policy. This court deems the possible harm which might result in suppressing the freedom of the First Amendment outweigh any threatened evil posed by the occupation by members of subversive organizations of units in federally aided housing projects. For this reason we must hold Resolution 513 adopted pursuant to the Gwinn Amendment to be unconstitutional and void.”

In the case at bar there are several circumstances which indicate that here, as in the *Lawson* case, there is no showing that either Congress or the Immigra-

tion and Naturalization Service regarded it as essential that applicants for suspension of deportation give up their First Amendment rights. First of all, there is the fact that here the Immigration Service issued its warrant for appellant's arrest in 1940 but took no action to execute the warrant until 1951. Second, it has promulgated no regulations requiring that applicants for suspension of deportation forego their rights to join organizations or to exercise First Amendment rights generally. Third, there is evidence that the Immigration Service has no reason to fear activity inimical to the interests of the country from the appellant here, for the Hearing Officer stated at the deportation hearing that there was no accusation against appellant of membership in any organization (R. 5, 6).

Of more importance perhaps is the fact that the Congress has, since the passage of the statute upon which appellant relies here, allowed suspension of deportation even to those who were formerly members of the Communist Party. See Sec. 1254(a) of 8 USC, the Immigration and Nationality Act of 1952, subsection 5.

Even without regard to that statute, the Immigration Service itself has found that persons admittedly closely associated with subversive organizations are not thereby rendered ineligible for suspension of deportation. See *In the Matter of K—*, 2 I&N 838, where the Board of Immigration Appeals allowed suspension of deportation in the case of one who had been a business partner of a notorious Nazi, one of

the leaders of the German-American Bund. His partnership with the leader of the Bund terminated only when the latter was arrested. He had accompanied his partner on two occasions to meetings of the Bund, had received literature from the German Library of Information, and had applied for membership in a national organization, controlled by the Nazis, of Germans who had fought in the German Army during World War I.

In the Matter of R—, 3 I&N 532, the applicant for suspension of deportation was an Italian who had been a member of the Fascist Party in Italy from 1925 until the time when he came to the United States in 1939. Even while in the United States he had been in favor of the then Government of Italy, which he felt was "all right for the people." During the period when the United States was at war with Italy he "favored Italy" according to his own testimony. He, too, was found eligible for suspension of deportation.

But it may be said that the Congress by providing that membership in the Communist Party or the Communist Political Association is ground for deportation indicated that members of those organizations were persons whose presence here is so inimical to the welfare of the United States that their rights of free speech and association must be limited. To this contention there are several answers. It will be argued in this brief below that the statute is a bill of attainder when it provides deportation for membership in an organization identified by its name alone. If that argument is correct, then the statute is void

in this particular and will, of course, provide no excuse for a violation of First Amendment rights.

The second answer to the argument is that the statute does not in terms require applicants for suspension of deportation to establish that they are not members of the classes who are made deportable by the statute. Had this been the congressional purpose, it would have been very easy to do at the time that the statute was amended to provide that members of the Communist Party are deportable.

The third answer to the argument is that it proves too much. Among those whose deportability is set forth in the statute are numerous classes, including those guilty of nearly every conceivable major crime as well as those with various defects, physical or mental. Did Congress find that members of these classes are so inimical to the United States that they are required to surrender their constitutional rights to freedom of speech and association? If not, why then are members of the Communist Party or of the Communist Political Association singled out? Again, since most members of these numerous classes are denied suspension of deportation, the statute as construed here means that one must establish to the satisfaction of the Attorney General that he is not within any such class before he can be eligible for suspension of deportation. Such a task is really beyond the power of any person, and surely was not contemplated by the Congress when it passed the statutes in question.

There is, therefore, nothing in the present Act which corresponds to the fear expressed by Congress that Communist leaders of trade unions would foment political strikes. The question whether an applicant for suspension of deportation has ever been a member of the Communist Party is therefore immaterial. If the applicant meets the statutory standards of eligibility, as appellant in this case does, his First Amendment rights are still protected. If it is true that the *Douds* decision breached the hitherto impregnable wall that surrounded First Amendment rights, yet the breach is not wide enough to admit invasion of appellant's rights under the circumstances present here. It is not the business of Courts to enlarge it.

B. The use of secret evidence violates the guarantee of due process contained in the First Amendment.

It is alleged (R. 7, 8), and must on this appeal be taken as true, that the denial of suspension of deportation was in part based upon the use of secret information contained in the files of the Immigration Service, but not disclosed to appellant. That is to say, statements taken from "faceless informers" has been used to deny discretionary relief for which appellant has satisfied the statutory requirements. This Court has very recently considered the effect of the use of secret evidence. In *Parker et al. v. Lester, et al.*, F.2d, it ruled that the right of a seaman to prospective employment could not be denied by a governmental agency without confronting him with the witnesses and evidence against him. Cf. the concur-

ring opinions of Mr. Justice Black and Mr. Justice Douglas in *Peters v. Hobby*, 349 U.S. 331.

It is true that in *Jay v. Boyd*, 222 F.2d 820, this Court upheld the use of confidential information in denying suspension of deportation. The question may soon be resolved by the Supreme Court of the United States which on January 9, 1956, granted certiorari in that case. In any event, the question should be re-examined. The considerations that moved the Court to its decision in *Parker v. Lester*, supra, have equal application to the case at bar. If, as Abraham Lincoln pointed out, yesterday's dogma is unequal to the stormy present, then there must be thinking anew.

II. THE STATUTE IS A BILL OF ATTAINDER.

The statutory interpretation here attacked is that the statute provides that members of the Communist Party and the Communist Political Association are not eligible for suspension of deportation. Therefore, it is argued, the Attorney General or his agent may require an applicant for suspension of deportation to establish that he is not a member of a class statutorily ineligible for suspension of deportation. The power of the Attorney General to require such a showing by an applicant for discretionary relief must fall if the statute itself falls. Thus we are brought to the question whether the provision that a member of the Communist Party may be deported by reason of his membership in that organization is either on its face or as construed and applied a bill of attainder.

By the familiar cases a bill of attainder is defined as a statute which by legislative fiat imposes punishment upon named individuals or the members of an easily identified class. *United States v. Lovett*, 328 U.S. 303. Here deportation (and ineligibility for suspension of deportation) is visited upon aliens who are or have been members of a class denominated "members of the Communist Party of the United States". The class is not described in any other way. It is not described, that is to say, by hurtful characteristics which might make its classification reasonable.

It is true, of course, that the punishment inflicted here is not a criminal sanction but a civil one. *Mahler v. Eby*, 264 U.S. 32. That it may be punishment, although civil in nature, is clearly established by those cases which have condemned legislative acts as bills of attainder. Thus, in *United States v. Lovett*, supra, proscription from government employment by a statute which directed that none of the monies appropriated for the expense of the government should be used to pay the salaries of certain named government employees was held to be punishment. There was nothing criminal about that sanction. In *Cummings v. Missouri*, 4 Wall. 277, it was held that prohibiting one from following the occupation of a priest and a teacher unless he first took an expurgatory oath was punishment. In *Ex parte Garland*, 4 Wall. 333, decided the same day as the *Cummings* case, a rule of the Supreme Court of the United States prohibited the practice of law before it by attorneys unless they first took an expurgatory oath. This was also found

to impose punishment. In *Burgess v. Salmon*, 97 U.S. 381, the collection of a tax on tobacco prior to the effective date of a statute which imposed the tax was held to be "civil punishment".

Further, deportation, in the form of transportation, was a penalty well known to the criminal law of England. See 1 Stephen, *History of the Criminal Law of England*, pp. 480, 481; and cf. the civil punishments imposed by English bills of attainder. In the *Cummings* case the Supreme Court cited the statute of 1 George I, Chap. 13, which among other punishments provided a civil penalty of 500 pounds to be recovered against any member of the class there punished by anyone who sued for it. The statutes 9 and 10 William III, Chap. 32, also cited, impose civil disabilities of incapacity to hold public office and inability to sue in the civil courts.

We have here, therefore, a statute which punishes membership alone. That such a statute is void because in violation of the bill of attainder clause of the Constitution would seem to require no extensive argument. In *Wieman v. Updegraff*, *supra*, a statute which punished membership alone was held unconstitutional. Cf. the decision of this Court in *Ex parte Fierstein*, 41 F.2d 53; see also *Kessler v. Strecker*, 95 F.2d 976, 96 F.2d 1020, *aff.* 307 U.S. 22.

There is no direct ruling by appellate courts on this question. *Galvan v. Press*, 347 U.S. 522, does not decide the issue. There, although the Court sanctioned deportation for prior membership in the Communist Party, appellant was in no position to claim that the

Communist Party was not an organization which advocated overthrow of the government by force and violence. He had, as the opinion makes clear, offered to reenter the Communist Party as a spy for the government. The point here raised could therefore not have been proposed by Galvan. Nor did the Court purport to pass on the question whether the statute was a bill of attainder.

Again, in *American Communications Association v. Douds*, 339 U.S. 382, the Court considered whether the Labor Relations Act was a bill of attainder when it provided that members of the Communist Party could not remain as leaders of trade unions. The Court there distinguished the ruling cases on bills of attainder on the ground that

“... Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. * * *

“This distinction is emphasized by the fact that members of those groups identified in §9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in

§9(h), is not a bar to resumption of the position. In the cases relied upon by the unions on the other hand, this Court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. See *United States v. Lovett*, supra, 328 U.S. at page 314, 66 S.Ct. at page 1078, 90 L.Ed. 1252; *Cummings v. Missouri*, supra, 4 Wall. at page 327, 18 L.Ed. 356. Here the intention is to forestall future dangerous acts; there is no one who may not by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder.”

So in the case at bar the punishment is imposed for past acts, or the questions are asked with relation to past acts. By the reasoning adopted by the Supreme Court in the *Douds* case, the statute here under consideration if construed as requiring no evidence of the nature and purpose of the Communist Party or the Communist Political Association, is a bill of attainder. One who belonged to it, believing it to be a wholly innocuous and proper organization, with no advocacy of overthrow of the government by force and violence, would be punished by reason of his membership although he had committed no wrong.

III. THE STATUTE AS CONSTRUED AND APPLIED IS VOID FOR VAGUENESS.

The Supreme Court in *Jordan v. De George*, 341 U.S. 223, has held that a deportation statute may, like

a criminal statute, be void for vagueness. As the statute in question here has been construed and applied by the Immigration Service, it requires an applicant for suspension of deportation to establish that he is not within any of the classes which are by the statute made ineligible for suspension of deportation. An examination of the statute will disclose what such a task would entail. An applicant for suspension of deportation under this rule would have to establish that he has not at any time since entry been a member of any of the following classes:

(1) Aliens who seek to enter the United States to engage in activities which would be prejudicial to the public interest or would endanger the welfare or safety of the United States;

(2) Aliens who at any time shall be or have been anarchists;

(3) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(4) Aliens who are members of or affiliated with the Communist Party of the United States, any other totalitarian party of the United States, the Communist Political Association, the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, or any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or the direct predecessors or successors of any such association or party;

(5) Aliens who advocate the economic, international, and governmental doctrines of world communism or the economic and governmental doctrines of any other form of totalitarianism, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism, or the economic and governmental doctrines of any other form of totalitarianism;

(6) Aliens who are members of or affiliated with any organization which is registered or required to be registered under section 786 of Title 50;

(7) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law, or the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers of the Government of the United States or of any other organized government, because of his or their official character, or the unlawful damage, injury, or destruction of property, or sabotage;

(8) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or have in their possession for the purpose of circulation, publication, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating the over-

throw by force or violence or other unconstitutional means of the Government of the United States or of all forms of law, or the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers of the Government of the United States or of any other organized government, or the unlawful damage, injury, or destruction of property, or sabotage, or the economic, international, and governmental doctrines of world communism or the economic and governmental doctrines of any other form of totalitarianism;

(9) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in the last paragraph above;

(10) Aliens with respect to whom there is reason to believe that they would be likely to engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or other activity subversive to the national security;

(11) Aliens with respect to whom there is reason to believe that they would engage in any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unconstitutional means,

or organize, join, affiliate with, or participate in the activities of any organization which is registered or required to be registered under section 786 of Title 50.

In addition to all of these, the alien would have to establish that he is not one who has been convicted of violations of the law regarding narcotics, the use of machineguns, nor a criminal, prostitute, procurer, other immoral person, the mentally or physically deficient, an anarchist, or "similar classes", made deportable under Sec. 19(a) of the Act (printed *supra* herein.)

To do so is manifestly beyond the powers of any man. Not only would it be impossible for him to marshal the evidence necessary to meet this test, but the classifications are so vague and indefinite that it would be impossible for him to know whether he was within the class or without. How does one know, for example, whether he is an alien "with respect to whom there is reason to believe" that he would be likely to engage in activities which would be prohibited by the laws of the United States relating to espionage, etc.?

It is appellant's position that the statute does not require any such impossible burden of an applicant for suspension of deportation. The construction placed upon the statute by the Immigration Service is highly artificial and unreasonable. It is also administratively unworkable. If this were uniformly required of applicants for suspension of deportation, no one would

ever have his deportation suspended. But the Immigration Service has so construed it in this case. Such an interpretation must be rejected by the Court.

IV. THE ATTORNEY GENERAL IS NOT AN INDISPENSABLE PARTY.

In this case the appellant has brought his action for an injunction and for declaratory relief against the District Director of Immigration and Naturalization. It is this officer who is charged by the applicable regulations (8 CFR §150.10) with the carrying out of deportation orders and orders to suspend deportation. He is before the Court and within the jurisdiction of the Court. That no other immigration official is necessary is clearly demonstrated by the decision of the Supreme Court in *Shaughnessy v. Pedreiro*, 349 U.S. 48:

“We also reject the Government’s contention that the Commissioner of Immigration and Naturalization is an indispensable party to an action for declaratory relief of this kind. District Directors are authorized by regulation to issue warrants of deportation, to designate the country to which an alien shall be deported, and to determine when his mental or physical condition requires the employment of a person to accompany him. The regulations purport to make these decisions of the District Director final. It seems highly appropriate, therefore, that the District Director charged with enforcement of a deportation order should represent the Government’s interest. Otherwise in order to try his case an

alien might be compelled to go to the District of Columbia to obtain jurisdiction over the Commissioner. To impose this burden on an alien about to be deported would be completely inconsistent with the basic policy of the Administrative Procedure Act to facilitate court review of such administrative action. We know of no necessity for such a harsh rule. Undoubtedly the Government's defense can be adequately presented by the District Director who is under the supervision of the Commissioner.

"It is argued, however, that the Commissioner should be an indispensable party because a judgment against a District Director alone would not be final and binding in other immigration districts. But we need not decide the effect of such a judgment. We cannot assume that a decision on the merits in a court of appeals on a question of this kind, subject to review by this Court, would be lightly disregarded by the immigration authorities. Nor is it to be assumed that a second effort to have the same issue decided in a habeas corpus proceeding would do any serious harm to the Government . . . Our former cases have established a policy under which indispensability of parties is determined on practical considerations. See, e.g., *Williams v. Fanning*, 332 U.S. 490, 92 L.ed. 95, 68 S.Ct. 188. That policy followed here causes us to conclude that the Commissioner of Immigration and Naturalization is not an indispensable party."

SUMMARY.

This Court is here asked to review and set aside the action of an administrative branch of the Government which seeks to substitute for the scheme adopted by the Congress one which holds out a privilege or benefit upon condition that the privilege-seeker forego Constitutional rights. The rights involved are those which have been thought to be characteristic of a democracy. Their maintenance is the task of all proponents of democracy, and the power to uphold them resides in this Court.

The Government here seeks, upon the basis of material gathered from those who hide behind an administrative cloak of anonymity, to subject the appellant to an inquisition upon his beliefs and associations ever since he came to the United States twenty-eight years ago. Further, perhaps because there is no real belief that his answers if truthfully given would afford any basis for exercising their claimed arbitrary power, they seek to require him to establish a negative—that he has not ever been in a class ineligible for suspension of deportation.

To allow the procedure the Government has employed in this case is to penalize a wholly inoffensive and valuable member of our community. Much more important, it is to sanction an interpretation of the statute which makes a mockery of the Constitutional prohibition against bills of attainder. And it is to allow the Government to do, on the basis of surmise, what it could not do if it were required to substantiate its suspicions by evidence produced in the light

of day. We may say with Montaigne that it is putting a very high value on our surmises to burn a man because of them.

While this Court sits, punishment should follow wholly democratic and Constitutional procedure only. The use of faceless informers should be recognized as an expedient devised, used and defended by those whose conception of Government is quite other than that of our Constitution.

Dated, San Francisco, California,
February 13, 1956.

Respectfully submitted,

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BANCROFT & TEPPER,

By LLOYD E. McMURRAY,
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No. 14,923

IN THE
United States Court of Appeals
For the Ninth Circuit

MARTIN JIMENEZ,

Appellant,

VS.

BRUCE BARBER, District Director of
the Immigration and Naturalization
Service for the Thirteenth Immi-
gration District,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

BRIEF OF THE APPELLEE.

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Subject Index

| | Page |
|--|------|
| Statement of the case | 1 |
| Questions presented | 4 |
| Statute involved | 4 |
| Argument : | |
| I. The complaint states no cause for judicial intervention.. | 5 |
| II. The Attorney General is an indispensable party | 8 |
| Conclusion | 10 |

Table of Authorities Cited

| Cases | Pages |
|--|----------|
| Adel v. Shaughnessy, 183 F.2d 371, 373 | 7 |
| Application of Orlando, 131 F. Supp. 485 | 7 |
| Barreiro v. Brownell, 215 F.2d 584, cert. denied 348 U.S. 887 | 6 |
| Bilokumsky v. Tod, 263 U.S. 149, 153 | 8 |
| Bugajewitz v. Adams, 228 U.S. 585, 591 | 11 |
| Ceballos v. Shaughnessy (CA 2), 30 F. Supp. 30, aff. 229 F.2d 592 | 10 |
| Chavez v. McGranery, 220 F.2d 857 | 6 |
| Galvan v. Press, 347 U.S. 522 | 11 |
| Harisiades v. Shaughnessy, 342 U.S. 580 | 11 |
| Hyun v. Landon, 219 F.2d 404, aff. per curiam March 26, 1956, 24 L.W. 3252 | 7 |
| Mahler v. Eby, 264 U.S. 32, 39 | 11 |
| Rodriguez v. Landon, 212 F.2d 508 | 8, 9, 10 |
| United States ex rel Frangoulis v. Shaughnessy, 210 F.2d 572 at p. 574 | 7 |
| United States ex rel Kaloudis v. Shaughnessy, 180 F.2d 489 | 6 |
| United States ex rel Matranga v. Mackey, 210 F.2d 160, cert. denied 347 U.S. 967 | 7 |
| United States ex rel Weddeke v. Watkins, 166 F.2d 360, at p. 373, cert. denied 333 U.S. 876 | 7 |

Statutes

| | |
|---|------------|
| Immigration Act of February 5, 1917, as amended, 8 U.S.C. 155(c) | 1, 2, 3, 4 |
| 8 U.S.C. 1101 footnote | 2 |

No. 14,923

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**United States Court of Appeals
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Appellee.

On Appeal from the United States District Court
for the Northern District of California.

BRIEF OF THE APPELLEE.

STATEMENT OF THE CASE.

Plaintiff is admittedly an alien illegally in the United States. There is, therefore, in this case no issue as to the ultimate fact of his deportability as an alien. The sole issue before the Court arises from plaintiff's application for suspension of deportation—a request to the Attorney General of the United States under 8 U.S.C. 155(c) to exercise his *discretion* in favor of plaintiff.

Paragraph VI of the Complaint alleges that plaintiff is eligible for suspension of deportation under the provisions of 8 U.S.C. § 155(c)(2).¹

Paragraph IV alleges that the principal ground upon which plaintiff's application for suspension of deportation was denied . . . was plaintiff's refusal to answer questions asked before the Hearing Officer in the deportation proceedings about his membership or affiliation with certain organizations . . ."

Paragraph III alleges that plaintiff's application for suspension was denied and that after he was taken into custody for purposes of deportation a petition for a writ of habeas corpus was filed, which was also denied.

Paragraph VII alleges that by reason of certain new decisions by Courts of Appeal plaintiff "abandoned his former position of refusal to answer questions regarding his membership in or affiliation with organizations and requested the Board of Immigration Appeals to re-open his case". He offered if the case was so re-opened to testify in answer to the questions which had been asked, or similar questions regarding his membership in or affiliation with organizations, for the five-year period during which under the provisions of 8 U.S.C. § 155 he was required to establish good moral character.

¹Section 155 was repealed by Public Law 414, Immigration and Nationality Act of 1952, but for the purposes of this action defendant concedes that the application for suspension was saved by the Savings Clause, Section 405 of Public Law 414, set forth as a footnote to Section 1101 of Title 8 U.S.C.

Paragraph VII concludes: "The application was denied by the Board of Immigration Appeals on March 22, 1955, on the ground that plaintiff had failed to establish his eligibility for suspension of deportation."

From the foregoing allegations of the complaint the following is established:

1. Plaintiff is a deportable alien.
2. He was eligible to apply for suspension of deportation under Title 8 U.S.C. 155(c).
3. He did so apply for suspension of deportation.
4. The application was entertained in that a hearing was held at which plaintiff was afforded the opportunity to show why the discretionary relief should be accorded him.
5. He refused to answer any questions about his membership in or affiliation with certain organizations.
6. Upon the refusal to answer the questions the relief sought was denied.
7. Plaintiff sought to reopen his case by offering to answer questions regarding his membership in or affiliation with certain organizations for the five-year period during which he was required to establish good moral character.
8. The application to reopen was denied by the Board of Immigration Appeals on March 2, 1955.

QUESTIONS PRESENTED.

1. Upon the allegations of the complaint, has the plaintiff stated any cause for judicial intervention in the immigration proceedings?
 2. Is the Attorney General an indispensable party?
-

STATUTE INVOLVED.

The Immigration Act of 1917, as amended by the Act of July 1, 1948, 62 Stat. 1206:

“Sec. 19(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States seven years or more and is residing in the United States upon the effective date of this Act. *If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons*

for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. . . ." (Italicized portion was not quoted by Appellant.)

ARGUMENT.

I.

ON THE ALLEGATIONS OF THE COMPLAINT NO CAUSE IS STATED FOR JUDICIAL INTERVENTION.

As stated hereinabove the allegations of plaintiff's complaint establish that an application for suspension of deportation was made and that said application was entertained by the Immigration and Naturalization Service; that a hearing was held upon said application and that at said hearing appellant *refused to answer questions*. No question was raised as to the statutory eligibility of the appellant to file the application. The relief requested was denied on the "principal ground" of appellant's refusal to answer the questions asked. It is appellant's contention that

although he may stand firm and refuse to answer questions, there is a burden upon the Attorney General to establish that he is not entitled to the benefit of discretionary relief. It is clear that the Congress of the United States in permitting an executive officer of the United States, to-wit, the Attorney General, to exercise a discretion has definitely imposed upon the appellant the burden of establishing that he is worthy of the relief sought.

This Court in the case of *Barreiro v. Brownell*, 215 F.2d 584, cert. denied 348 U.S. 887 held:

“The power vested in the Attorney General by paragraph 155(c) was a discretionary power. Hence the Attorney General would not have been required to suspend appellant’s deportation, even if appellant had alleged and proved, and had obtained a judgment declaring that he was eligible for such suspension.”

In *Chavez v. McGranery*, 220 F.2d 857, this Court with reference to 8 U.S.C. 155(c) said:

“Unquestionably the action so far taken by the administrative agency was ‘by law committed to agency discretion.’ It is clear petitioner received from the agency upon his own formal request some relief in their discretion. He has no ground to sue because in a matter committed to discretion, they failed to go further.”

The Second Circuit, in *United States ex rel Kaloudis v. Shaughnessy*, 180 F.2d 489, held that where one is eligible for suspension of deportation, he is entitled to the exercise of the Attorney General’s discretion, but

“The power of the Attorney General to suspend deportation is a dispensing power like a judge’s power to suspend the execution of a sentence, or the President’s to pardon a convict. It is a matter of grace over which courts have no review, unless . . . it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant. It is by no means true that ‘due process of law’ inevitably involves an eventual resort to courts, no matter what may be the interest at stake; not every governmental action is subject to review by judges.”

See also:

United States ex rel Matranga v. Mackey, 210 F.2d 160, cert. denied 347 U.S. 967;

United States ex rel Weddeke v. Watkins, 166 F.2d 360, at p. 373, cert. den. 333 U.S. 876;

United States ex rel Frangoulis v. Shaughnessy, 210 F.2d 572, at p. 574;

Adel v. Shaughnessy, 183 F.2d 371, 373.

The duty of the Court is “. . . to make an overall evaluation of the procedures used, the facts disclosed, and the decision reached, with the understanding that the order is unassailable if the statutory proceedings are fairly followed.”

Application of Orlando, 131 F. Supp. 485.

The Court may take note of *Hyun v. Landon*, 219 F.2d 404, affirmed by the Supreme Court, at per curiam March 26, 1956, 24 L.W. 3252 by an equally divided Court, wherein this Court stated:

“Both this Court and the Supreme Court of the United States have held that an inference may be drawn from the refusal of an alien to testify in his own behalf in deportation proceedings.”

Bilokumsky v. Tod, 263 U.S. 149, 153.

II.

THE ATTORNEY GENERAL IS AN INDISPENSABLE PARTY.

On this point this Court in ruling on the Motion for a Stay of Deportation herein had the following to say:

“The failure to join the Attorney General presents a substantial question: If the court resolved the substantive issue in favor of *Jimenez*, could it issue an effective order against the District Director of Immigration alone? This court has not ruled on whether the Attorney General is an indispensable party to an action such as this one.”

In Footnote 2 the following was said:

“This court has expressly declined to rule on the question. *Rodriguez v. Landon*, 212 F.2d 508, 509. Note 6.”

Turning to *Rodriguez v. Landon*, 212 F.2d 508, this Court said:

“If the Order of June 4, 1951, was reviewable under 5 U.S.C.A. 1009, the Commissioner of Immigration and Naturalization was an indispensable party to any action seeking such review.”

This Court also said:

“Although named as a party to this action the Attorney General⁶ was not served with process and could not have been so served in this action, his official residence being in the District of Columbia.”

Footnote 6 states:

“As to whether the Attorney General was an indispensable party, we expressed no opinion.”

The concluding sentences of the Opinion are as follows:

“The complaint prayed for declaratory relief, but it did not appear from the complaint that there was any actual controversy between appellant and appellee, the only parties before the court. In short, the complaint stated no claim upon which relief could be granted.”

The only parties before the Court were the appellant *Rodriguez* and the appellee *Landon*, the District Director of Immigration and Naturalization in Los Angeles. From the foregoing it would appear that there was no question in the Court's mind that the District Director was not a proper party and that there was no “actual controversy” between the appellant and the District Director. There also appears to have been no question but that the Commissioner of Immigration and Naturalization was an indispensable party. There was obviously no reason for determining whether or not the Attorney General was an indispensable party after the Court had concluded

that there was no "actual controversy" between the appellant and the appellee.

In the instant case the only appellee is Bruce Barber, the District Director of Immigration and Naturalization. It would, therefore, appear that there is no "actual controversy" between the appellant and the appellee as in the *Rodriguez* case.

Ceballos v. Shaughnessy, (CA 2) 30 F. Supp. 30, aff. 229 F.2d 592.

CONCLUSION.

We fail to discover any material issue argued by appellant in his brief. He is admittedly an alien illegally in the United States in that at the time of his entry he was not in possession of an unexpired immigration visa. Appellant would like us to argue the question of whether or not a member of the Communist Party *may be deported* by reason of his membership in that organization. On page 26 of his Brief he states the question as follows:

"Thus we are brought to the question whether the provision that a member of the Communist Party may be deported by reason of his membership in that organization is either on its face or as construed and applied a bill of attainder."

It does not appear from the Brief how appellant reaches this question from his failure to answer questions in support of his application for discretionary relief of suspension of deportation. The same asser-

tion is made with regard to subdivisions 1 and 3 of appellant's brief. Generally as to these matters the following cases are dispositive:

Harisiades v. Shaughnessy, 342 U.S. 580;

Galvan v. Press, 347 U.S. 522;

Bugajewitz v. Adams, 228 U.S. 585, 591;

Mahler v. Eby, 264 U.S. 32, 39.

The appellant has failed to allege a cause for judicial intervention. The order of the Court below dismissing the action should be affirmed.

Dated, San Francisco, California,

April 20, 1956.

Respectfully submitted,

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No. 14,923

United States Court of Appeals
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MARTIN JIMENEZ,

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BRUCE BARBER, District Director of
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On Appeal from the United States District Court
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Southern Division.

APPELLANT'S PETITION FOR A REHEARING
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Subject Index

| | Page |
|---|------|
| Argument | 2 |
| I. The United States Supreme Court is reexamining the decision on which this court rested its opinion | 2 |
| II. The court failed to pass expressly on Constitutional issues which are necessarily involved in the decision | 6 |
| III. The court should hear this case en banc | 9 |

Table of Authorities Cited

| Cases | Pages |
|---|--------------|
| American Communication Associations CIO v. Douds, 339 U.S. 382 | 8 |
| Burges v. Solomon, 97 U.S. 381 | 9 |
| Cummings v. Missouri, 4 Wall. 277 | 9 |
| Ex parte Fierstein, 41 F. 2d 53 | 7 |
| Ex parte Garland, 4 Wall. 333 | 9 |
| Galvan v. Press, 1954, 347 U.S. 522 | 2, 4, 5 |
| Garcia v. Landon, 207 F. 2d 693 | 4 |
| Peters v. Hobby, 349 U.S. 331 | 10 |
| Rowoldt v. Perfetto, 24 Law Week 3217 (opinion below 228 F. 2d 109) | 3 |
| United States v. Lovett, 328 U.S. 303 | 9 |
| Wieman v. Updegraff, 344 U.S. 183 | 8 |

Constitutions

| | |
|--------------------------------------|------|
| United States Constitution: | |
| First Amendment | 6 |
| Fifth Amendment | 6 |
| Article I, Section 9, Clause 3 | 4, 9 |

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On Appeal from the United States District Court
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Southern Division.

APPELLANT'S PETITION FOR A REHEARING AND HEARING EN BANC.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

Comes now appellant herein and petitions this Court
for a rehearing on the merits and for a hearing *en
banc*. The grounds for this petition are three:

1. In its decision of July 12, 1956, this Court relied
principally upon a decision of the Supreme Court
which that Court is now reexamining.

2. This Court in its opinion on the merits failed to acknowledge certain constitutional issues which this Court had earlier found present in the case and which are necessary to its decision.

3. The case has been passed upon by two different panels of the Court. The two panels expressed different views about the constitutional issues. A hearing *en banc* is necessary to obtain a decision which truly reflects the views of the Court.

ARGUMENT.

I. THE UNITED STATES SUPREME COURT IS REEXAMINING THE DECISION ON WHICH THIS COURT RESTED ITS OPINION.

To the extent that the Court recognized the presence of constitutional issues in this case, it rested its decision upon a case which the United States Supreme Court has now agreed to reexamine. In its opinion of July 12, 1956, this Court said:

“But in any event such questions were relevant and were within the legitimate area of inquiry in such a case as this. *Cf. Galvan v. Press*, 1954, 347 U.S. 522 . . .”

The *Galvan* case found constitutional a statute which allowed deportation for prior membership in the Communist Party. Although it cannot be said to be a square holding on the point at issue in the case at bar, it bears a direct relation to the question in this case. The case at bar concerns the propriety of asking questions about membership in the Communist

Party and other questions about association and political activities as a necessary step in establishing eligibility for suspension of deportation. The theory upon which such questions are relevant rests upon the fact that the statute denies suspension of deportation to those who are deportable by reason of membership in the Communist Party at any time since entry.

The decision of this Court, therefore, must be read as holding that questions about membership in the Communist Party and similar questions are relevant to determine eligibility for suspension of deportation because one who has been a member of the Communist Party is deportable therefor, and hence is excluded from eligibility for suspension of deportation. If it should be held that deportation for prior membership in the Communist Party is not constitutional, then the authority for this Court's decision would fall. The possibility that such a result may obtain in the next few months is presented by the grant of certiorari to the Eighth Circuit in the case of *Rowoldt v. Perfetto*, 24 Law Week 3217 (opinion below 228 F. 2d 109). This case is now No. 34 on the docket for the October 1956 term.

In *Rowoldt v. Perfetto* the two questions presented to the Supreme Court are (1) whether evidence of petitioner's membership in the Communist Party was sufficient to support his deportation, or whether it showed only nominal membership which would not authorize deportation; (2) whether the 1952 statute's provision for deportation for past Communist Party membership is unconstitutional on its face or as ap-

plied. 24 L.W. 3217. This last issue is the issue which was passed upon in *Galvan v. Press*.¹

Even without reexamination by the Supreme Court of the *Galvan* decision, there is a serious question whether this Court correctly interpreted that decision. As we pointed out in our motion for a stay of deportation, the *Galvan* case did not pass upon the question whether a statute allowing deportation for prior membership in the Communist Party, without evidence of the nature of the party and without evidence of scienter of the nature of that organization is a bill of attainder in violation of Article I, Section 9, Clause 3 of the Constitution. The reason for a failure to pass upon this question appears clear from the facts of the case as related in the Supreme Court's decision. Galvan was in no position to argue that the Communist Party was not an organization advocating overthrow of the government by force and violence or that its character was not known. He evidently agreed that the organization did so advocate, for as appears by a footnote in the Supreme Court decision he offered to return to the Communist Party as an informer and spy for the government. The question whether the statute is a bill of attainder has not been passed upon by the Supreme Court in any case and still remains undecided.

¹This is the second time the Court has granted certiorari in a case involving the *Galvan* rule. In *Garcia v. Landon*, 207 F. 2d 693, the Supreme Court granted certiorari to this Court, and the Government prevented a decision on the case only by granting the alien relief by administrative action and then having the case dismissed as moot. This Court cites *Garcia* in this case, along with *Galvan*.

This view of the *Galvan* case has been seen by the panel of this Court which passed upon the motion for stay of deportation. In the decision of October 13, 1955, in this case, this Court noted:

“The Supreme Court recently declined to decide the issue of the constitutionality of basing governmental action on memberships and associations. See *Peters v. Hobby*, 349 U.S. 331 (1955). We do not understand that *Galvan v. Press*, 347 U.S. 522 (1954), is necessarily decisive of the issue in this case. Likewise the scope of the bill of attainder clause is unclear as applied to the taking away of a right or privilege because of belief, memberships or associations. Cf. *American Communications Association CIO v. Douds*, supra; *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716 (1951); with *United States v. Lovett*, 328 U.S. 303 (1946). These are questions worth argument.”

The panel of this Court which wrote the decision on the merits evidently accepted the *Galvan* case uncritically for the proposition that deportation for past membership in the Communist Party is in all instances constitutional. When the Supreme Court finds that question undecided, or if decided then worthy of reconsideration, this Court which has interpreted the *Galvan* decision in two inconsistent ways, should review the question at length.

II. THE COURT FAILED TO PASS EXPRESSLY ON CONSTITUTIONAL ISSUES WHICH ARE NECESSARILY INVOLVED IN THE DECISION.

Without discussion this Court in its decision on the merits has decided that neither the First or the Fifth Amendments nor the prohibition against bills of attainder exercises any restraint on the power of the government to initiate or withhold governmental action upon condition that the political ideas and associations of an alien are pleasing to the administration in power. It is not the province of a petition for rehearing to argue the merits of the questions raised, but it is proper to point out that such a decision should be made only with the fullest expression of opinion and the most complete consciousness of the implications of the decision in the conduct of public affairs of this democracy.

The broad implications of the decision of this Court are inescapable. They are set forth below.

When this Court said:

“ . . . in any event such questions were relevant and were within the legitimate area of inquiry in such a case as this ”

it was referring to questions about membership in or affiliation with organizations, including a political party. The necessary implication of the decision is therefore that governmental action having a direct impingement on a person within the United States may be initiated or withheld by reason of political opinion and association. This is a departure from

the view long held in the United States and throughout the world that political orthodoxy was a concept unknown to the law of the United States.

It may be that this Court feels that membership in the Communist Party is an inquiry, not into a question of political belief or association but into criminal association and activity. There can be no doubt that criminal activity may be a relevant consideration in determining whether to offer or withhold governmental action, but to conclude in this case that the Communist Party is a criminal organization is to take judicial notice of a question of fact as to which there is no evidence in the record. In *Ex parte Fierstein*, 41 F. 2d 53, this Court expressly declined to take judicial notice of this matter, and the law as expressed in that decision appears to be consistent with all the law in the United States prior to the decision on which we are here seeking a rehearing.

Further, the Court in deciding that the question of membership is relevant in this case is necessarily deciding that membership alone is a basis upon which governmental action may be based. The questions asked of the appellant, the materiality and relevancy of which are questioned in this action, were questions about membership, not about activities of a criminal nature. That is, the question was not, "Have you ever participated in a conspiracy designed to overthrow the Government of the United States?" or any variant of such a question, but, "Have you ever been a member of the Communist Political Association or

of the Communist Party?" Although the Supreme Court in *Wieman v. Updegraff*, 344 U.S. 183, held unconstitutional state action which denied a privilege (teaching in the public schools) on the basis of membership in an organization alone, this Court finds no constitutional impediment to such action on the part of the federal government. Yet it does not attempt to distinguish *Wieman*.

There can be little doubt that requiring one to forego political activity or membership as a condition of affording a governmental privilege is an abridgement of free speech. Without saying so, this Court has necessarily held by implication that such an abridgement of free speech is constitutional at least where membership in the Communist Party or the Communist Political Association is the determining factor. In *American Communication Associations CIO v. Douds*, 339 U.S. 382, the Supreme Court held that such abridgements of free speech must stand or fall by the nature of the governmental interest as measured against the degree of invasion of free speech. Although there is neither evidence nor argument before the Court to the effect that the governmental interest in deporting members or former members of the Communist Party is one closely linked to the internal security or the general welfare of the United States, this Court apparently has decided that question as a matter of law. It is the rule of this case that the governmental interest in deporting persons identified as members or past members of a certain organization is sufficient to override the guar-

antee of free speech contained in the First Amendment.

Another necessary implication of the decision in this case, which if it was intended should be express and not implicit, is that penalties may be inflicted by legislative fiat and without judicial trial upon members of a named group without conflict with the bill of attainder clause of the Constitution (Art. I, Sec. 9, Clause 3). No previous authority exists for such a decision. Although the Courts have held that the prohibition against *ex post facto* laws does not apply to deportation statutes because they are not penal, there are no such decisions with regard to the bill of attainder clause. *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *United States v. Lovett*, 328 U.S. 303, all held unconstitutional as bills of attainder legislative enactments which withheld governmental privileges from citizens. In *Burges v. Solomon*, 97 U.S. 381, the collection of a tax on tobacco under certain circumstances was held to be "civil punishment". This Court ignores those decisions.

III. THE COURT SHOULD HEAR THIS CASE EN BANC.

Two panels of this Court have considered whether there are serious constitutional questions raised by this case. On October 13, 1955, one panel consisting of Judges Denman, Orr and Chambers ruled that there were several constitutional issues in the case.

They pointed out that there was a question whether the "indirect, conditional, partial abridgement" of free speech involved in this case was one which was constitutional as tested by a balance of the nature of the governmental interest against the degree of invasion of free speech. They pointed out further that the Supreme Court had recently declined in *Peters v. Hobby*, 349 U.S. 331, to decide the issue of the constitutionality of basing governmental action on memberships and associations. The Court said further:

"We do not understand that *Galvan v. Press*, 347 U.S. 522 (1954) is necessarily decisive of the issue in this case."

The Court noted that the scope of the bill of attainder clause was unclear in such cases as this and noted the principal cases bearing on that question. The Court concluded:

"These questions are worth argument."

A second panel, consisting of Judges Denman, Hastie and Tolin passed upon the merits of the case on July 12, 1956. That Court found no constitutional questions which it expressly recognized, and to the extent that constitutional questions are decided by its opinion they are done so without explicit answers to the questions which the earlier panel noted in this case.

It is not necessary therefore to rely upon inference alone in saying that the decision of a single panel cannot correctly state the views of the entire Court. The differences among members of the Court on this

case are demonstrated. In such a situation the parties are entitled to a hearing *en banc*.

Dated, San Francisco, California,
August 9, 1956.

Respectfully submitted,

McMURRAY, BROTSKY, WALKER,
BANCROFT & TEPPER,

By LLOYD E. McMURRAY,
*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,

August 9, 1956.

LLOYD E. McMURRAY,

*Of Counsel for Appellant
and Petitioner.*

No. 14925

United States
Court of Appeals
for the Ninth Circuit

YIP MIE JORK,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

JUN 25 1953

WILLIAM H. FOSTER, CLERK

No. 14925

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

| | PAGE |
|---|------|
| Answer | 8 |
| Appeal: | |
| Certificate of Clerk to Transcript of Record | |
| on | 22 |
| Designation of Record on (USCA)..... | 207 |
| Notice of | 20 |
| Statements of Points on (USCA)..... | 206 |
| Stipulation re Original Exhibits on..... | 21 |
| Certificate of Clerk to Transcript of Record... | 22 |
| Designation of Record on Appeal (USCA).... | 207 |
| Findings of Fact and Conclusions of Law: | |
| Filed June 2, 1955 | 9 |
| Filed August 10, 1955 | 14 |
| Judgment: | |
| Filed June 2, 1955 | 12 |
| Filed August 10, 1955 | 18 |
| Names and Addresses of Attorneys..... | 1 |
| Notice of Appeal | 20 |
| Order Setting Aside Judgment, Findings and | |
| Conclusions and Reopening Case | 13 |
| Petition for Declaratory Judgment | 3 |

ii.

| | |
|--|-----|
| Statement of Points on Appeal (USCA)..... | 206 |
| Stipulation and Order for Substitution of Party Defendant | 7 |
| Stipulation re Original Exhibits..... | 21 |
| Transcript of Proceedings and Testimony, May 2-3, 1955 | 23 |

Witnesses:

| | |
|-----------------|----|
| Peter Fong | |
| —direct | 61 |
| —cross | 94 |
| —redirect | 97 |

| | |
|----------------|----|
| Edward D. Wong | |
| —direct | 25 |

| | |
|---------------------|----|
| Share Leung Yip | |
| —direct | 30 |
| —by the Court | 72 |
| —direct | 73 |
| —cross | 75 |
| —redirect | 83 |

| | |
|-----------------|----|
| She Mang Yip | |
| —direct | 53 |
| —cross | 86 |
| —redirect | 93 |

| | |
|--|-----|
| Transcript of Proceedings and Testimony, July 18 and 26, 1955 | 101 |
|--|-----|

Witnesses:

| | |
|---------------|-----|
| Lily L. Chan | |
| —direct | 102 |

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Russell Chan

—direct 124

Fay Jean Chew

—direct 142

Leong Lan Gin

—direct 103, 121

—cross 197

—redirect 198

Chew Jock

—direct 164

—cross 179

—redirect 186

—recross 187

Chin Shee

—direct 153

—cross 189

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* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court for the Southern District of California, Central Division

No. 14967-T.

YIP MIE JORK,

Plaintiff,

vs.

DEAN ACHESON, as Secretary of State,

Defendant.

PETITION FOR DECLARATORY JUDGMENT
UNDER SECTION 503 OF THE NATIONALITY ACT OF 1940 (8 U.S.C. 903)

Plaintiff, Yip Mie Jork, complains of the defendant and for cause of action alleges:

I.

This complaint is filed and these proceedings are instituted against the defendant under Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 1172, 8 U.S.C. 903) for a judgment declaring the plaintiff to be a national of the United States.

II.

The defendant is the duly appointed, qualified, and acting Secretary of State of the United States, and as such is head of the Department of State; that the American Consul General at Hong Kong, British Crown Colony is, and at all times herein complained of, was an executive official of the defendant within the Department of State. [2]

III.

The plaintiff is the true and lawful blood son of Yip Dock, now deceased, who was a citizen of the United States, born at San Francisco, California on March 1, 1885 (K.S. 11-1-15) and who held Certificate of Identity No. 13203 issued on October 2, 1913 by the Immigration & Naturalization Service, San Francisco, California, denoting such citizenship.

IV.

The plaintiff's father, Yip Dock, made various departures from the United States to China and reentered the United States, the exact dates and ports of departure and reentry being unknown to plaintiff.

V.

The plaintiff's father, Yip Dock, was married to Wong Shee on May 6, 1913 (C.R. 2-4-1) at Kin Mo Village, Chung Shan District, Kwangtung Province, China; that such marriage was contracted in accordance with the marriage customs and ceremonies approved and legally recognized in China; that no official record of such marriage is available in China so far as the plaintiff is informed; that the plaintiff is the issue of the aforesaid marriage of Yip Dock and Wong Shee and was born on the date and at the place hereinafter shown: Yip Mie Jork, born February 22, 1928 (C.R. 17-2-2) at Kin Mo Village, Chung Shan District, Kwangtung Province, China.

VI.

On or about October, 1950, the plaintiff filed with

the American Consul General at Hong Kong, British Crown Colony, an application for issuance of a United States passport or other documentation permitting him to travel to the United States; that [3] since the filing of plaintiff's application for passport or other documentation permitting him to travel to the United States the American Consul Service General, Hong Kong, British Crown Colony, has declined and refused to issue to the plaintiff a United States passport or other document facilitating his travel to the United States.

VII.

Plaintiff has at all times herein mentioned claimed and now claims the rights and privileges of a national of the United States to enter, remain, and reside permanently in the United States as a citizen thereof, but the defendant, acting through his official executive, to-wit: the American Consul General, Hong Kong, British Crown Colony, has inexcusably delayed arbitrarily and unreasonably refused and denied him the right or privilege of a United States national to be issued a passport or a document for the purpose of traveling to the United States, on the ground he is not a national of the U. S.

VIII.

The plaintiff desires and intends to come to the United States and establish his domicile in Los Angeles, California which is the residence of his brother, Yip Share Leung, and plaintiff claims

permanent residence in the Southern District of California and within the jurisdiction of this Court.

IX.

Plaintiff has never committed any act nor executed any instrument of expatriation nor renounced his United States citizenship.

X.

Plaintiff, Yip Mie Jork, claims to be a United States citizen and/or national, such citizenship and/or nationality having been acquired pursuant to the provisions of Section 1993, Revised Statutes of the United States.

Wherefore, plaintiff prays for judgment declaring him to be [4] a national of the United States and for such other and further relief as may be just and proper.

/s/ MARSHALL E. KIDDER,

Attorney for Plaintiff [5]

[Endorsed]: Filed December 23, 1952.

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR SUBSTITUTION OF PARTY DEFENDANT

It Is Hereby Stipulated by and between counsel in the above entitled matter that John Foster Dulles, as Secretary of State, be substituted as party defendant for Dean Acheson as Secretary of State.

This stipulation is made pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

Dated: March 16, 1953.

/s/ MARSHALL E. KIDDER,
Attorney for Plaintiff

WALTER S. BINNS,
United States Attorney,

CLYDE C. DOWNING,
Asst. U. S. Attorney, Chief, Civil
Division,

/s/ By ARLINE MARTIN,
Asst. U. S. Attorney,
Attorneys for Defendant

It Is So Ordered this 10th day of April, 1953.

/s/ HARRY C. WESTOVER,
United States District Judge [9]

[Endorsed]: Filed April 10, 1953.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, Dean Acheson, as Secretary of State, through his attorneys, Walter S. Binns, United States Attorney for the Southern District of California, and Clyde C. Downing and Arline Martin, Assistant United States Attorneys for the Southern District of California, and in answer to plaintiff's Complaint herein, admits, denies and alleges as follows:

I.

Denies the allegations contained in Paragraphs III, IV, V, VI, VII, VIII, IX and X.

II.

Defendant neither admits nor denies the allegations contained in Paragraph I, of plaintiff's Complaint, the same being a conclusion of law.

III.

Admits the allegations contained in Paragraph II of said Complaint, that the defendant is the duly appointed, qualified and acting Secretary of State of the United States and as such is head of the Department of State. [6]

For a Further, Separate and Second Defense Defendant Alleges:

I.

The Complaint of plaintiff fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for a judgment dismissing said Complaint and denying the relief prayed for therein and for costs.

WALTER S. BINNS,
United States Attorney

CLYDE C. DOWNING,
Asst. U. S. Attorney, Chief, Civil
Division

/s/ ARLINE MARTIN,
Asst. U. S. Attorney
Attorneys for Defendant [7]

Affidavit of Service by Mail attached. [8]

[Endorsed]: Filed January 13, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above cause having come on regularly for trial on May 2, 1955 and May 3, 1955, before the Hon. Harry C. Westover, Judge Presiding without a jury, the plaintiff being represented by his attorney, Marshall E. Kidder, and the defendant being represented by his attorneys, Laughlin E. Waters, United States Attorney, and Max F. Deutz and

James R. Dooley, Assistant United States Attorneys by James R. Dooley; and evidence both oral and documentary having been introduced and received, and the Court having considered the same, and having heard the arguments of counsel and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

Plaintiff, Yip Mie Jork, claims permanent residence within the Southern District of California, and within the jurisdiction of this Court. [22]

II.

The defendant, John Foster Dulles, is the duly appointed, qualified, and acting Secretary of State of the United States, and as such is the head of the Department of State.

III.

On September 5, 1951, plaintiff executed an application for passport at the American Consulate General, Hong Kong, B.C.C., in which application he claimed to be a citizen of the United States, and in which he sought a passport to travel to the United States.

IV.

On December 23, 1952, the date on which the action herein was instituted, the defendant had not passed upon plaintiff's application for passport. The delay by defendant in passing upon plaintiff's application for passport was unreasonable; and

prior to December 23, 1952, plaintiff had been denied a right or privilege as a national of the United States by defendant upon the grounds that plaintiff was not a national of the United States.

V.

Plaintiff, Yip Mie Jork, claims to be the true and lawful blood son of Yip Dock, his alleged father, and claims to have acquired nationality and/or citizenship through Yip Dock by virtue of Section 1993 of the Revised Statutes of the United States.

VI.

The evidence adduced by the plaintiff to establish that he is the lawful blood son of Yip Dock was so scant, and the witnesses who testified on behalf of plaintiff had so little knowledge of the claimed relationship, that plaintiff has failed to sustain his burden of proving that he is the lawful blood son of Yip Dock. [23]

VII.

Plaintiff has failed to sustain his burden of proving that he is a national or citizen of the United States.

Conclusions of Law

I.

This Court has jurisdiction of the within action pursuant to Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C.A. § 903.

II.

The burden was upon the plaintiff to establish

his claim to United States nationality, and plaintiff has failed to sustain that burden.

III.

Judgment should be entered in favor of the defendant and against the plaintiff, dismissing plaintiff's Complaint and cause of action. and awarding to the defendant his costs and disbursements.

Dated This 2nd day of June, 1955.

/s/ HARRY C. WESTOVER,

Judge, U. S. District Court [24]

Affidavit of Service by Mail attached. [25]

[Endorsed]: Filed June 2, 1955.

[Title of District Court and Cause.]

JUDGMENT

The above cause having come on regularly for trial on May 2, 1955 and May 3, 1955, before the Hon. Harry C. Westover, Judge Presiding without a jury, the plaintiff being represented by his attorney, Marshall E. Kidder, and the defendant being represented by his attorneys, Laughlin E. Waters, United States Attorney, and Max F. Deutz and James R. Dooley, Assistant United States Attorneys by James R. Dooley; and evidence both oral and documentary having been introduced and received, and the Court having considered the same, and having heard the arguments of counsel and

being fully advised in the premises; and the Court having heretofore made its Findings of Fact and Conclusions of Law and having ordered that judgment be entered in accordance therewith;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed: [26]

1. That judgment be entered in favor of the defendant and against the plaintiff, dismissing plaintiff's Complaint and cause of action.

2. That the defendant have his costs and disbursements herein incurred, taxed at \$20.00.

Dated: This 2nd day of June, 1955.

/s/ HARRY C. WESTOVER,
United States District Judge [27]

[Endorsed]: Filed and entered June 2, 1955.

[Title of District Court and Cause.]

ORDER SETTING ASIDE JUDGMENT, FINDINGS AND CONCLUSIONS AND REOPENING CASE

The above cause having come on regularly for hearing on June 27, 1955 before the Honorable Harry C. Westover, Judge Presiding, in connection with plaintiff's motion for new trial, the plaintiff being represented by his attorney, Marshall E. Kidder, and the defendant being represented by his attorneys, Laughlin E. Waters, United States Attorney, and Max F. Deutz and James R. Dooley, Assistant United States Attorneys, By James R.

Dooley, the Court having considered the written motion and affidavits and having heard the arguments of counsel, enters the following order:

It Is Hereby Ordered that the Judgment heretofore entered on June 2, 1955, as well as the Findings of Fact and Conclusions of Law upon which the said Judgment is predicated, be vacated and set aside, and that the case be reopened for the purpose of receiving additional evidence.

Dated: This 13th day of July, 1955.

/s/ HARRY C. WESTOVER,

United States District Judge [28]

Acknowledgment of Service attached. [29]

[Endorsed]: Filed July 13, 1955. Judgment entered July 14, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause having come on regularly for trial on May 2, 1955 and May 3, 1955, before the Honorable Harry C. Westover, Judge Presiding without a jury, the plaintiff being represented by his attorney, Marshall E. Kidder, and the defendant being represented by his attorney, Laughlin E. Waters, United States Attorney, and Max F. Deutz and James R. Dooley, Assistant United States Attorneys, by James R. Dooley; and the Court, after

having received evidence both oral and documentary, having considered the same, and having heretofore on June 2, 1955 filed its Findings of Fact and Conclusions of Law and entered Judgment in accordance therewith; and counsel for plaintiff having moved the Court for a new trial, and the Court having ordered that the Judgment theretofore entered on June 2, 1955 as well as the Findings of Fact and Conclusions of Law upon which said Judgment [30] was based, be vacated and set aside and that the case be reopened for the purpose of receiving additional evidence; and the above cause having come on for hearing on July 18, 1955 and on July 26, 1955 for the purpose of receiving additional evidence, before the Honorable Harry C. Westover, Judge Presiding without a jury, both parties having the same representation as at the former hearing; and additional evidence both oral and documentary having been introduced and received on behalf of both plaintiff and the defendant, and the Court having considered the same; and the Court having heard the arguments of counsel and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

Plaintiff claims permanent residence within the Southern District of California, and within the jurisdiction of this Court.

II.

The defendant, John Foster Dulles, is the duly

appointed, qualified, and acting Secretary of State of the United States, and as such is the head of the Department of State.

III.

On September 5, 1951, plaintiff executed an application for passport at the American Consulate General, Hong Kong, B.C.C., in which application he claimed to be a citizen of the United States, and in which he sought a passport to travel to the United States.

IV.

On December 23, 1952, the date on which the action herein was instituted, the defendant had not passed upon plaintiff's application for passport. The delay by defendant in passing upon plaintiff's application for passport was unreasonable. By reason [31] of such delay plaintiff had been denied a right or privilege as a national of the United States by defendant upon the grounds that plaintiff was not a national of the United States prior to December 23, 1952.

V.

Plaintiff claims to be the true and lawful blood son of Yip Dock, his alleged father, and claims to have acquired nationality and/or citizenship through Yip Dock by virtue of Section 1993 of the Revised Statutes of the United States.

VI.

The evidence adduced by the plaintiff to establish that he is the lawful blood son of Yip Dock was so scant; the witnesses who testified on behalf of the

plaintiff had so little real knowledge of the claimed relationship; and the testimony of the witnesses who appeared on behalf of the plaintiff was, in many respects, so improbable and unworthy of belief; that the plaintiff has failed to satisfy or convince this Court that the person who purports to be Yip Mie Jork, and who executed an application for passport at the American Consulate General, Hong Kong, B.C.C., on September 5, 1951, is the lawful blood son of Yip Dock, or to satisfy or convince this Court that the person who purports to be Yip Mie Jork is in truth and in fact Yip Mie Jork.

VII.

The plaintiff has failed to present sufficient credible evidence to sustain his burden of proving that he is the lawful blood son of Yip Dock.

VIII.

The plaintiff has failed to sustain his burden of proving that he is a national or citizen of the United States. [32]

Conclusions of Law

I.

This Court has jurisdiction of the within action pursuant to Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C.A. § 903.

II.

The burden was upon the plaintiff to establish his claim to United States nationality, and plaintiff has failed to sustain that burden.

III.

Judgment should be entered in favor of the defendant and against the plaintiff, dismissing plaintiff's complaint and cause of action, denying the relief prayed for therein, and awarding to the defendant his costs and disbursements.

Dated: This 10th day of August, 1955.

/s/ HARRY C. WESTOVER,

United States District Judge [33]

Affidavit of Service by Mail attached. [34]

[Endorsed]: Lodged August 2, 1955. Filed August 10, 1955.

In the United States District Court for the Southern District of California, Central Division

Civil No. 14967-HW

YIP MIE JORK.

Plaintiff,

VS.

JOHN FOSTER DULLES, as Secretary of State,
Defendant.

JUDGMENT

The above cause having come on regularly for trial on May 2, 1955 and May 3, 1955, before the Honorable Harry C. Westover, Judge Presiding without a jury, the plaintiff being represented by his attorney, Marshall E. Kidder, and the defendant being represented by his attorney, Laughlin

E. Waters, United States Attorney, and Max F. Deutz and James R. Dooley, Assistant United States Attorneys, by James R. Dooley; and the Court, after having received evidence both oral and documentary, having considered the same, and having heretofore on June 2, 1955 filed its Findings of Fact and Conclusions of Law and entered Judgment in accordance therewith; and counsel for plaintiff having moved the Court for a new trial, and the Court having ordered that the Judgment theretofore entered on June 2, 1955 as well as the Findings of Fact and Conclusions of Law upon which said Judgment [35] was based, be vacated and set aside and that the case be reopened for the purpose of receiving additional evidence; and the above cause having come on for hearing on July 18, 1955 and on July 26, 1955 for the purpose of receiving additional evidence, before the Honorable Harry C. Westover, Judge Presiding without a jury, both parties having the same representation as at the former hearing; and additional evidence both oral and documentary having been introduced and received on behalf of both plaintiff and the defendant, and the Court having considered the same; and the Court having heard the arguments of counsel and being fully advised in the premises; and the Court having heretofore made its Findings of Fact and Conclusions of Law;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That judgment be entered in favor of the de-

fendant and against the plaintiff, dismissing plaintiff's complaint and cause of action, and denying the relief prayed for therein.

2. That the defendant have his costs and disbursements herein incurred, taxed at \$20.00.

Dated: This 10th day of August, 1955.

/s/ HARRY C. WESTOVER,
United States District Judge [36]

Affidavit of Service by Mail attached. [37]

[Endorsed]: Lodged Aug. 2, 1955. Filed Aug. 10, 1955. Entered Aug. 11, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Yip Mie Jork, Plaintiff herein, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment in the above entitled action against plaintiff and in favor of defendant which said judgment was entered in this action on August 11, 1955.

/s/ MARSHALL E. KIDDER,
Attorney for Plaintiff [38]

Acknowledgment of Service attached. [39]

[Endorsed]: Filed August 26, 1955.

[Title of District Court and Cause.]

STIPULATION REGARDING ORIGINAL
EXHIBITS

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the original exhibits introduced at the trial of the action, may be considered in their original form by the United States Court of Appeals for the Ninth Circuit in connection with the pending appeal, and need not be printed.

Dated this 10th day of October, 1955.

/s/ MARSHALL E. KIDDER,
Attorney for Plaintiff

LAUGHLIN E. WATERS,
United States Attorney

MAX F. DEUTZ,
Asst. U. S. Attorney

JAMES R. DOOLEY,
Asst. U. S. Attorney

/s/ By JAMES R. DOOLEY
Attorneys for Defendant

[Endorsed]: Filed October 13, 1955.

[49]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 49, inclusive, contain the original:

Petition for Declaratory Judgment;

Answer;

Stipulation and Order for Substitution of Party Defendant;

Motion and Notice of Motion to Dismiss;

Findings for Fact and Conclusions of Law (filed 6/2/55);

Judgment (filed 6/2/55);

Order Setting Aside Judgment, and Reopening Case;

Findings of Fact and Conclusions of Law (filed 8/10/55);

Judgment (filed 8/10/55);

Notice of Appeal;

Order Extending Time to Docket Appeal;

Designation of Contents of Record on Appeal;

Counter-Designation of Contents of Record on Appeal;

Stipulation Regarding Original Exhibits and a full, true and correct copy of the minutes of the court for April 25, 1955, which, together with original defendant's exhibits A and B and Plaintiff's exhibits 1-7, inclusive, in the above-entitled cause,

constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 27th day of October, 1955.

[Seal] JOHN A. CHILDRESS,
 Clerk

/s/ By CHARLES E. JONES,
 Deputy

In the United States District Court for the Southern District of California, Central Division

No. 14967-HW—Civil

YIP MIE JORK, Plaintiff,
 vs.

JOHN FOSTER DULLES, Secretary of State,
 Defendant.

TRANSCRIPT OF TESTIMONY

Los Angeles, Calif., Monday, May 2, 1955

Honorable Harry C. Westover, Judge presiding.

Appearances: For the Plaintiff: Marshall E. Kidder, 448 South Hill St., Suite 1218, Los Angeles,

Calif. For the Defendant: Laughlin E. Waters, U.S. Attorney, by James R. Dooley, Asst. U.S. Attorney, 600 Federal Bldg., Los Angeles, Calif. [1*]

The Clerk: No. 14967-HW Civil, Yip Mie Jork vs. John Foster Dulles, Secretary of State, trial.

Mr. Kidder: Ready for the plaintiff.

Mr. Dooley: Ready for the defendant, your Honor.

The Court: I will make the usual order, that all of the witnesses remain out of the courtroom except the one on the stand.

Mr. Kidder: Yes, your Honor.

The Court: We have a motion pending to amend the Complaint.

Mr. Kidder: Yes, your Honor.

The Court: The motion is granted.

Mr. Dooley: Your Honor, for the purpose of the record I would like to object to this amendment on the ground that the statute under which this action was brought has expired and that an amendment is not authorized.

The Court: The objection is overruled.

Mr. Kidder: The interpreter is here. I might say this gentleman speaks reasonably good English. It may be we would need the interpreter only for dates.

The Court: Swear the interpreter.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Whereupon, Edward D. Wong was duly sworn to interpret the Chinese language into English and the English language into Chinese.) [2]

Mr. Dooley: Your Honor, I would like to have a short voir dire of the interpreter.

The Court: All right.

EDWARD D. WONG

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Dooley): Mr. Wong, do you know the plaintiff in this case? A. No, sir.

Q. Do you know any of the witnesses who are to appear in this case? A. No, sir.

Q. Have you discussed this case with any of the witnesses who are to appear in this proceeding?

A. No, sir.

Q. Have you discussed this case with the attorneys for the plaintiff in this proceeding?

A. No, sir.

Q. Have you interpreted before in any federal proceeding? A. Yes, sir.

Q. Are you qualified to interpret in the federal courts? A. Yes.

Q. Have you interpreted in the federal courts previously? [3] A. Yes, sir.

Mr. Dooley: No further questions.

(Witness excused.)

The Court: Call your first witness.

Mr. Kidder: Mr. Wong, will you stand beside him?

The Court: Let's try to get along without the interpreter. It will be faster if we can get by without the interpreter.

Mr. Kidder: Mr. Wong, will you stand by and only if he indicates he doesn't understand, perhaps you can interpret to him.

The Interpreter: All right, sir.

SHARE LEUNG YIP

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Share Leung Yip.

Mr. Kidder: Your Honor, at this time there may be part of the files that we should have, the passport file in the Department of State and, also, I am sure the government has available the immigration files pertaining to two of my witnesses, as well as the alleged father of the plaintiff. I would ask that those files be made available so that they can be introduced as evidence. [4]

The Court: Are you willing to stipulate that they can be introduced?

Mr. Kidder: I am willing to stipulate.

The Court: The government as a general rule has no objection. Mr. Dooley?

Mr. Dooley: No objection.

(Testimony of Share Leung Yip.)

The Court: Produce the files and we will have them marked.

The Clerk: Which file was introduced at the time of the motion?

Mr. Kidder: That was the Department of State file.

The Clerk: You will have to re-offer that one. That will be 1 in evidence.

Mr. Kidder: This is the Department of State file relating to Yip Mie Jork, the plaintiff, marked Exhibit 1.

The Court: Exhibit 1.

(The file referred to was received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Kidder: I offer at this time the file of the Immigration and Naturalization Service pertaining to Yip Dock.

The Clerk: Exhibit 2.

(The file referred to was received in evidence and marked Plaintiff's Exhibit No. 2.)

The Court: Who is Yip Dock?

Mr. Kidder: The father of the plaintiff.

I offer at this time the file of the Immigration and Naturalization [5] Service, No. 12017/44352, relating to the witness Yip Share Leung. He is the person on the stand at the present time.

The Court: Exhibit 3.

(The file referred to was received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Kidder: I offer at this time the Immigration and Naturalization file, San Francisco, No.

(Testimony of Share Leung Yip.)

1300-100322, relating to Yip She Mang, who will be called as a witness.

The Court: Who is Yip She Mang?

Mr. Kidder: The plaintiff is his uncle, half uncle.

The Court: Exhibit 4.

(The file referred to was received in evidence and marked Plaintiff's Exhibit No. 4.)

The Court: Maybe the government will be willing to stipulate to some facts. Is there any dispute here that the father was either born in this country or was admitted as the son of an American national?

Mr. Dooley: The government will stipulate, your Honor, that the Immigration and Naturalization Service has conceded the birth of the father in this country.

The Court: Can you stipulate how many trips the father took to China and the dates of those trips?

Mr. Dooley: Yes, your Honor. I can stipulate as to that. I mean as to what the records of the Immigration and Naturalization [6] Service show.

The Court: All right.

Mr. Dooley: They indicated that he departed on August 8, 1907, returned June 20, 1908.

Departed May 11, 1913, returned September 28, 1913.

Departed July 10, 1926, returned July 5, 1929, according to the *cards* of the Immigration and Naturalization Service.

The Court: Can you stipulate as to the children?

(Testimony of Share Leung Yip.)

How many children does the record show that the father claims to have had? Is the plaintiff the only child?

Mr. Kidder: No. There are other children. There are four all together.

Mr. Dooley: It is in the Immigration and Naturalization file.

The Court: Can we get the names of the children and the alleged birthdays?

Mr. Dooley: Your Honor, I don't think that should be a matter of stipulation.

The Court: Can we get the names of the children? That isn't going to jeopardize the position of the government. What are the names of the children?

Mr. Kidder: Yip Share, also Ser, evidently, Leung—I am reading now from the record of the arrival of the father on July 5, 1929, at San Francisco.

Yip Jeong Sing. [7]

No. 3 is the plaintiff, Yip—it is spelled M-a-i J-e-r-k.

No. 4 is Yip Ser Wang.

Mr. Dooley: Your Honor, the plaintiff introduced those records into evidence and actually they belong to the defendant. I would like for them to be so marked so that the defendant can withdraw those at the expiration of the period.

The Court: I will make an order that the exhibits may be withdrawn at the conclusion of the case. What difference does it make whether they

(Testimony of Share Leung Yip.)

are introduced in behalf of the plaintiff or defendant?

Mr. Dooley: In attempting to get them from the clerk, the clerk will only permit you to withdraw those exhibits which you have introduced.

Mr. Kidder: I have no objection.

The Court: All right. They will be withdrawn as the plaintiff's exhibits and re-marked as Defendant's Exhibits A, B, C, D, and E.

Direct Examination

Q. (By Mr. Kidder): What is your name?

A. Share Leung Yip.

Q. Where do you live, Mr. Yip?

A. Now?

Q. Yes. [8]

A. 656 Westbourne Drive.

Q. Do you have any names or name other than that of Yip Share Leung?

A. Yes. I have the professional name of George Chann.

Q. What is your business or occupation?

A. I am an artist, a portrait painter.

Q. Of what country are you a citizen, Mr. Yip?

A. I am a citizen of the United States.

Q. Where were you born?

A. I was born in China, Canton, China.

Q. Is that Canton City?

A. Canton—no, Kin Mo Village.

Q. Give us the name of the first village.

A. Now Tao Gong.

(Testimony of Share Leung Yip.)

Q. What is the date of your birth?

A. KS Dynasty 34 years, 11th month and the 1st day.

The Court: Do you know what the English translation is?

The Interpreter: I can't make the translation here, but I can interpret it.

The Court: Well, I don't know whether or not Mr. Dooley is an expert on these dates.

Mr. Kidder: This is only a question of transposition from English to Chinese.

The Court: What was the date? KS 34, 11-1. Let's leave it at that for the present time. [9]

Q. (By Mr. Kidder): Do you know your birth date in English? A. In English?

Q. Or the American date?

A. I don't remember that.

Q. Do you know the year?

A. I am 48 years.

Mr. Kidder: I believe the files already in evidence, your Honor, contain the statements which give us the correct date of birth with the American date, also. Perhaps that will suffice.

Q. What is the name of your father?

A. Yip Dock.

Q. What is the name of your mother?

A. Wong See.

Q. Do you know when your parents were married? A. No.

Q. Do you have any full blood brothers and sisters?

(Testimony of Share Leung Yip.)

A. No. You mean the same mother and father?

Q. The same mother and the same father.

A. No.

Q. Are you the only boy of your parents?

A. Yes.

The Court: Do you mean to say we have a Chinese family here where the father got married twice? [10]

Mr. Kidder: Yes, your Honor.

The Court: That is something new. So there is only one child for the first marriage?

The Witness: That's right.

The Court: And you are it?

The Witness: I am the first child.

The Court: Do you remember your father at all?

The Witness: Yes.

The Court: How old were you when your father died?

The Witness: My father died Chinese Republic 18th year.

The Court: Do you remember your mother?

The Witness: Yes.

The Court: How old was your mother? Is your mother dead?

The Witness: She passed away in Chinese Republic 34.

The Court: Chinese Republic 34?

The Witness: Yes, 34.

The Court: How old were you when your mother died?

The Witness: About 38.

(Testimony of Share Leung Yip.)

The Court: I am not asking you the year. Do you remember when your mother died?

The Witness: I was in this country.

The Court: You were in this country?

The Witness: Yes.

The Court: You weren't home when your mother died?

The Witness: I was not home. [11]

The Court: Were you home when your father remarried?

The Witness: In Kin Mo Village.

The Court: Were you in China?

The Witness: Yes.

The Court: Did you attend the wedding?

The Witness: I was quite small.

The Court: How small?

The Witness: I was seven or eight years of age.

The Court: Is that Chinese or American?

The Witness: How much difference? A few months. Around that age.

The Court: How long did you stay in China after your father married the second time?

The Witness: I stayed in Kin Mo until I was 12 years of age.

The Court: You stayed there until you were 12, and then you left to come to the United States?

The Witness: Yes. I left the village and come to the United States.

The Court: When you came to the United States when you were 12 years of age, you left your mother in the village?

(Testimony of Share Leung Yip.)

The Witness: I left——

The Court: Did you leave your father in the village?

The Witness: My father was here.

The Court: Your father was in this country?

The Witness: Yes.

The Court: Did your mother have any children when you left the village to come to the United States?

The Witness: We have one brother.

The Court: Your mama had one other son when you came to the United States?

The Witness: Yes.

The Court: Who was that?

The Witness: Jeang Shing.

The Court: How old was Jeang Shing when you came to the United States?

The Witness: Well, let's see. He was born in Chinese Republic 3 years, and I was 12 and he was 2 or 3 years——

The Court: 2 or 3 years old?

The Witness: Yes.

The Court: Then when you came to the United States the plaintiff hadn't been born. After you came to the United States when you were 12 years old, did you go back to the village?

The Witness: I go back to China, not the village.

The Court: You did not go back to the village, but you went to China?

The Witness: Yes.

(Testimony of Share Leung Yip.)

The Court: You didn't go and see your mama?

The Witness: No. [13]

The Court: You didn't see the plaintiff Yip Mie Jork, you didn't see him?

The Witness: No.

The Court: Have you ever seen him?

The Witness: Yes, I have seen him.

The Court: When?

The Witness: The last time was in China in, let us say, 1949.

The Court: Where did you see him?

The Witness: In Macao.

The Court: How old was he?

The Witness: Now——

The Court: When you saw him in Macao.

The Witness: 22, or something like that.

The Court: How did you know that this was the boy that was born in the village some 22 years before?

The Witness: My father was in China in Kin Mo Village. I stayed in Canton City and he write to me.

The Court: So all you have is letters written to you?

The Witness: Yes.

The Court: So you didn't see this boy until he was 22 years of age.

The Witness: That's it.

The Court: You saw him in Macao.

The Witness: Yes. [14]

The Court: Was anybody with him?

(Testimony of Share Leung Yip.)

The Witness: Another brother.

The Court: Another brother?

The Witness: Yes.

The Court: Where was the mama?

The Witness: The mama passed away.

The Court: How did you know this was the boy who was born to your mama and who was called Yip Mei Jork?

The Witness: The father write me we have a boy brother.

The Court: Did he ever send you any pictures?

The Witness: Well, at that time he had pictures, but the——

Mr. Kidder: Your Honor, the father died in 1929 in the United States.

The Court: But here is a witness who never saw this boy until he was 22 years of age. How in the world is he going to say this is the boy that was born to his mama.

Mr. Kidder: Only by family association.

The Court: I don't think that's enough. You have got to have something in the family association.

Mr. Kidder: We have both his mother and step-mother dead. The father died in 1929. He died in the United States.

The Court: According to this witness, he saw the plaintiff in Macao in 1949. He was 22 years of age then. This boy could have made an application many years before 1949 to come to the United States. Maybe he did. I don't know. [15]

(Testimony of Share Leung Yip.)

Mr. Kidder: I believe, as a matter of fact, there was something started in 1931, I believe, in this case, but it was not renewed again until after the war in 1950, when a new affidavit was filed, but that was filed by the witness, the half-brother here, because of the parents being deceased, that is the mother, stepmother and father.

The Court: You may proceed and bring out any testimony you think is pertinent to this matter.

Mr. Kidder: Thank you.

Q. Mr. Yip, when did your mother die? What was the name of your mother?

A. Wong See.

Q. When did she die ?

A. She died in Chinese Republic 34 years.

Q. That is your own mother?

A. My stepmother.

Q. I said your own mother.

A. Oh, my mother, Chinese Republic 2nd year.

Q. Do you know what year that is in English or in American? How old were you when your true mother died?

A. About five or six years of age.

Q. Did your father remarry?

A. Yes. He married again.

Q. When did he remarry?

A. Chinese Republic 2nd year. [16]

Q. Is that the same year your true mother died?

A. Yes.

Q. What was the name of his second wife?

A. Wong See again.

(Testimony of Share Leung Yip.)

Q. The same name? A. Yes.

Q. Do you have any brothers or sisters, that is half-brothers or sisters, as a result of that marriage of your father with his second wife?

A. We have three brothers.

Q. What is the name of your eldest half-brother?

A. The second brother is Yip Jeang Shing. The third is Yip Mie Jork.

Q. First tell me when was Yip Jeang Shing born, approximately?

A. I think it is Chinese Republic 3rd year.

Q. Where was he born?

A. Kin Mo Village.

Q. What is the name of your second half-brother? A. Yip Mie Jork.

Q. Is he the plaintiff in these proceedings?

A. Yes.

Q. When was Yip Mie Jork born?

A. Kin Mo Village.

Q. When? [17] A. CR 17 years.

Q. What is the name of your third half-brother?

A. Share Wong.

Q. Where was he born?

A. In Kin Mo Village.

Q. What is the date of his birth?

A. CR 18 years.

Q. When did you first come to the United States? A. I come the first time 1919.

Q. Where did you land?

A. In San Francisco.

Q. You stated that you had made trips to China.

(Testimony of Share Leung Yip.)

Will you tell when you made your first trip to China or first trip to the Orient, let me say?

A. My first trip to China, when I was—CR 15.

Q. Do you know the American year?

The Court: There is about 11 years difference between CR and American. I don't know whether that is true as far as KS is concerned, but I do know it is 11 years as far as CR is concerned.

Mr. Kidder: That is substantially correct, yes. I didn't know it could be figured that way.

The Court: That is what all the testimony is, about 11 years.

Q. (By Mr. Kidder): Then when did you return to the [14] United States?

A. I think CR 20.

The Court: You were in China about five years?

The Witness: About four or five years, yes, at that time.

Q. (By Mr. Kidder)): Where did you live during that period?

A. In China?

Q. Yes.

A. In Canton City.

Q. In Canton City?

A. Yes.

Q. When did you make your second trip?

A. The second trip to this country in the '20s, CR 20 years.

The Court: You came back in CR 20 and you immediately turned back and went back to China? You just said you went to China in CR 15 and you came back to the United States in CR 20. The question is, when did you go back to China the second time?

(Testimony of Share Leung Yip.)

The Witness: CR 15.

The Court: That is the first time.

The Witness: The second time? The second time is 1947.

The Court: American or Chinese?

The Witness: This is American. This is recently.

The Court: Second time in 1947? [19]

The Witness: 1947, yes.

Q. (By Mr. Kidder): When did you return?

A. In 1949.

Q. Do you know the month?

A. Well, I arrive in San Francisco Thanksgiving.

Q. Thanksgiving Day 1949?

A. Yes, that I remember.

Q. Where were you on that trip?

A. Well, I was around, Hongkong, Macao, Shanghai, Nanking.

Q. What was the purpose of your trip to China at that time?

A. Well, after the war I like to paint China. I am a painter. I paint different scenery and people in China.

Q. Did you exhibit any of your paintings at that time?

Mr. Dooley: I object on the ground it is irrelevant, immaterial.

The Court: Overruled.

Q. (By Mr. Kidder): Did you give any exhibition of your portraits at that time?

A. Yes. I have exhibition in Hongkong.

(Testimony of Share Leung Yip.)

Q. Any other places?

Mr. Dooley: Object, your Honor, on the ground it is immaterial and irrelevant as to his exhibition of paintings.

The Court: Overruled. [20]

Q. (By Mr. Kidder): Any other place you gave exhibits of your paintings?

A. Hongkong the first time, the only time.

Q. Did you ever live in Kin Mo Village?

A. Yes.

Q. When did you live there?

A. Since we moved down from Tao Gong, and I stayed there until 12 years of age.

The Court: I want to ask this witness a question. You said you went to China in 1947 and you came back to the United States in 1949.

The Witness: Yes.

The Court: You also said that you saw the plaintiff in Macao in 1949.

The Witness: Yes, that's it.

The Court: You were in China, then, two years before you saw the plaintiff?

The Witness: Yes.

The Court: This village, the home village where the plaintiff was born, how far is that from Canton City?

The Witness: Quite far, I remember, quite far.

The Court: What do you mean by "quite far"? How many miles?

The Witness: It takes a day in a night boat.

The Court: Up the river? [21]

(Testimony of Share Leung Yip.)

The Witness: There is no way from the village to Canton Village. You have to go to Macao or Hongkong and then go up to Canton City. In China, communication is very poor.

The Court: Do you understand a map?

The Witness: Yes, I can. If I have a map, I can tell you how to go.

The Court: I want to know the approximate location of this village. We have a map here. On this map is Hongkong and here is Macao.

The Witness: Yes.

The Court: And here is Canton.

The Witness: Yes, there is Canton.

The Court: Which way from Macao is the village?

The Witness: This is Macao.

The Court: Macao.

The Witness: It is from here an island, and then you go to Macao, that is overnight, and then to Hongkong right here, and then you go to Canton.

The Court: You go from the village to Macao and take a ferry over to Hongkong and go from Hongkong to Canton?

The Witness: If you want to go to Canton, yes.

The Court: How would you go from Hongkong to Canton?

The Witness: By train or by boat.

The Court: Was your village near the coast?

The Witness: It is on the coast, yes. [22]

The Court: How far from Macao was your village?

(Testimony of Share Leung Yip.)

The Witness: Probably about 15 hours, all night.

The Court: By train or boat?

The Witness: Boat. No train.

The Court: When you were down in China in 1947 to 1949, you said you went to China in 1947, and when did you go to Macao?

The Witness: 1949.

The Court: Did you write to your brother, your half-brother?

The Witness: Yes, I write to my half-brother.

The Court: That you were coming down to Macao?

The Witness: That I was coming to Macao.

The Court: And he met you at Macao?

The Witness: Yes, he met me.

The Court: All right.

Q. (By Mr. Kidder): Tell us where you went, what you did in China during these two years you were there from approximately 1947 to 1949.

A. As I said, I am a painter and I have to have a new subject to exhibit. That is my purpose to go to China, and then I do go to paint in Hongkong, Macao, the village, all the people there, and then I went to Shanghai and Nanking, and Soochow, and all the different provinces, and I paint them, and then I exhibit there. [23]

Q. Exhibit where?

A. In Hongkong and at—well, I would be very thankful to Americans, I am a citizen, and so I have a very wonderful—you ask me what I do, so I try to tell you what I can do in China. So I have

(Testimony of Share Leung Yip.)

an exhibition to show my work in Hongkong, and I bring back here and exhibit here, too.

Q. Did you go to Kin Mo Village when you were in China during this period? A. No.

Q. Were you present in Kin Mo Village when Yip Mie Jork, the plaintiff, was born?

A. No, no.

Mr. Dooley: I object on the ground it has been asked and answered.

The Court: He said he never saw this boy until he was 22 years of age. He was not in China, he said.

Mr. Kidder: Did he say he was not in China or that he was not present?

The Court: He said he had never seen the plaintiff until he was 22 years of age and then saw him in Macao.

Mr. Kidder: We will agree to that, but there was a question whether he was in China at the time or not, and that is what I was bringing out. First, whether he was present, and then if not, where he heard of the birth.

The Court: He couldn't be, because—— [24]

Mr. Kidder: He has testified to being in China between CR 15 and 20.

The Court: But he never went back to the village. He never saw the boy.

Mr. Kidder: We will agree to that. I want to develop where he was at the time of the birth and how he knew of the birth. It has been established for the record he was not present.

(Testimony of Share Leung Yip.)

Q. Where were you residing at the time of the birth of Yip Mie Jork?

A. I don't quite get that.

Q. Where were you living or staying?

A. I was in Canton City.

Q. When did you first learn of the birth of Yip Mie Jork?

A. The same year he was born, my father write to me.

Q. Where were you when you received this letter, in what city were you?

A. I was in Canton City.

The Court: You don't have that letter?

The Witness: I don't have it, sir. It is a long time ago.

Q. (By Mr. Kidder): You testified you didn't see Yip Mie Jork actually until 1949. Did you have any communication with him between the time you first knew of his birth and 1949? [25]

A. You mean before 1949?

Q. Yes. A. No.

Q. Did you communicate with him at all in any fashion?

Mr. Dooley: Objected to on the ground it has been asked and answered.

The Court: Overruled.

The Witness: 1947, I did send a letter through a friend to him.

Q. (By Mr. Kidder): You say you sent a letter through a friend? A. Yes.

(Testimony of Share Leung Yip.)

Q. Was the letter delivered or was it sent through the mail?

A. I give the letter to the friend.

Q. What is the name of the friend?

A. Peter Fong.

Q. Did you deliver anything else?

A. I gave him \$50 cash.

Q. For what purpose?

A. I gave it to him—well, he live near our village and he go back to China and I send some money and a letter to them.

Q. You stated you met Yip Mie Jork for the first time in 1949 in Macao. Will you tell us under what circumstances [26] you met him there at that time?

A. Well, as I said, I have been around the country in China and I thought I would come back to this country very soon, so I should be to see him, so I write a letter from Hongkong and ask him to come over to Macao.

Q. Where did you send this letter?

A. Where?

Q. Yes. A. In Hongkong.

Q. You mailed the letter from Hongkong?

A. Yes.

Q. Where did you send the letter?

A. Kin Mo Village.

Q. What happened after that?

A. After that I go to Macao, I went over to Macao and wait for them and they come to Macao and meet me there.

(Testimony of Share Leung Yip.)

Q. Who do you mean by "they"?

A. My two brothers.

Q. That is your half-brothers?

A. My two half-brothers.

Q. Who are they, give their names, please?

A. Yip Mie Jork and Yip Share Wong.

Q. Where did you meet them in Macao?

A. Well, I met them in Kwok Jai Hotel.

Q. How long did they stay in Macao? [27]

A. They stay about two days.

Q. Then where did they go, if you know?

A. They went back to the village.

Q. Where did you go?

A. I come back to Hongkong.

Q. How did you know this was your brother Yip Mie Jork who came to Macao?

A. He come to see me, and then we began to ask, to talk about family affairs and the mothers, the village, and we talk about these affairs, so naturally we know they was my brothers.

Q. What is the name of the mother of your half-brother? A. Wong See.

Q. Is she living or dead?

A. She passed away.

Q. When did she pass away?

A. CR 34 years.

Q. Where did she die?

A. Kin Mo Village.

Q. Mr. Yip, did you have any photographs taken of you and your half-brother when you were in Macao in 1949? A. Yes.

(Testimony of Share Leung Yip.)

Mr. Kidder: May I have this marked?

The Court: It may be marked.

The Clerk: Plaintiff's Exhibit 5 for identification.

(The photograph referred to was marked Plaintiff's Exhibit 5 for identification.) [28]

Q. (By Mr. Kidder): I now show you Plaintiff's Exhibit No. 5 for identification, being a photograph, and I ask you if you can identify the persons in this photograph.

A. Yes. Those are my two brothers, taken in Macao.

Q. Will you start from the right here and name the persons in this photograph?

A. Yip Mie Jork and myself and Yip Share Wong.

Q. Where was this photograph taken?

A. In Macao in the back of the Kwok Jai Hotel.

Q. On what date, approximately?

A. It is 1949, about the 9th month.

Q. That is the American month or the Chinese month?

A. It is American month.

Mr. Kidder: I offer this Plaintiff's Exhibit 5 for identification in evidence.

Mr. Dooley: No objection.

The Court: It may be received in evidence.

The Clerk: Exhibit 5.

(The photograph heretofore marked Plaintiff's Exhibit 5 was received in evidence.)

Q. (By Mr. Kidder): I now show you a document attached to Plaintiff's Exhibit 1, the passport

(Testimony of Share Leung Yip.)

file of the Department of State, dated April 24, 1950, and I ask you if this is your signature contained therein. A. Yes, sir. [29]

Q. Can you identify this document?

A. Yes.

Q. What is it?

A. This apply to my half-brother to come over here. Here are my pictures and my brother.

Q. Is this an affidavit you filed in behalf of the plaintiff? A. Yes.

Q. I now show you a photograph which appears in Plaintiff's Exhibit 1 depicting three persons. Can you identify the people in this photograph?

A. Myself, Yip Mie Jork, and Yip Share Wong.

Q. Where was this photograph taken, if you know? A. In Macao.

Q. Was that taken at the same time?

A. No.

Q. The same time that 5 was? A. No.

The Court: Was this taken during the same year?

The Witness: It is the same year, same date, but it is different. This is a studio.

Q. (By Mr. Kidder): And the other is taken outside. A. That's it.

Q. But they were taken on or about the same date, is that correct? [30]

A. The same date, that is correct.

Q. I show you another small photograph on the same page in Plaintiff's Exhibit No. 1 and ask you

(Testimony of Share Leung Yip.)

if you can identify this small photograph in the upper right-hand corner.

A. This is myself and this is Mie Jork.

Q. When was this photograph taken?

A. At the same time.

Q. Where? A. In Macao.

Q. I now show you a photograph in the lower left-hand corner of this page in Plaintiff's Exhibit 1. Can you identify the persons?

A. My father.

Q. What is his name? A. Yip Dock.

Q. I now show you a photograph on the lower right-hand corner of this page in Plaintiff's Exhibit 1. Can you identify that person?

A. Yip Share Wong.

The Court: When these photographs were taken in 1949, how old were you?

The Witness: 1949? About how many years, is that it?

The Court: Don't you remember except by adding? Can't you tell me how old you were in any way except by subtracting years?

The Witness: About 40. [31]

The Court: How old was the plaintiff when this picture was taken?

The Witness: 22, about 22.

The Court: How old was his brother then?

The Witness: About 21.

The Court: Had you ever seen either one of these boys up until the time you saw them in 1949?

The Witness: That is the only time I saw them.

(Testimony of Share Leung Yip.)

The Court: The only time you have ever seen them?

The Witness: The only time I saw them in Macao.

The Court: You had never seen them before then?

The Witness: No.

The Court: And you haven't seen them since.

The Witness: No.

The Court: How many days were you in Macao?

The Witness: Two or three days.

The Court: How many days were these boys in Macao?

The Witness: About two or three days.

The Court: Stay in the same hotel?

The Witness: Yes, stay in the same hotel.

The Court: Nobody came along with these two boys, just the two of them?

The Witness: Just the two of them.

The Court: How did you recognize them?

The Witness: They come over and ask me in the hotel and [32] I come down and meet them and we introduced each other, and we go up to the hotel and we talk over family affairs, and I talk about a minute, and I took in the village and so many years I haven't met them, and I have to talk all the things I know, and they answer me, and I have no doubt in my mind it is my brother, so I put him in—I live on the 4th floor, I remember, and they live in the next room to my room. When you

(Testimony of Share Leung Yip.)

talk to your brother, you ask all the questions, all about the village, all the mother, and all those question, and they answer, and in that way I have no doubt in my mind they are my brothers.

The Court: What happened to Yip Share Wong? Did he ever make an application?

Mr. Kidder: Yip Share Wong?

The Court: The younger brother?

Mr. Kidder: I don't know. I would be glad to ask the witness.

The Court: Did he ever try to come to the United States?

Mr. Kidder: I don't know. Perhaps the witness knows.

The Court: Where is the fourth boy?

The Witness: In the village now.

The Court: Did he ever make an application to come to the United States?

The Witness: No. I haven't made application for him to come over here. [33]

Q. (By Mr. Kidder): Can you tell us why you haven't made such an application?

A. We do have some land in China, see, and then one has to take care of it, the house and the land. My father left and therefore he farm the home. One come over and I just apply for him to come over.

Q. How much money do you make as a portrait painter?

A. Well, I paint pictures—well, three or four hundred, four or five hundred—if you want to know

(Testimony of Share Leung Yip.)

my work, I exhibit in almost every museum in the country. I don't want to brag myself, but I am a painter, and I have been painting. I painted General MacArthur.

Q. I want to know approximately what is your income as a portrait painter.

A. Unfortunately, artists have no definite income.

Q. About how much?

A. I make a living, about average, I make two or three thousand dollars a year, with a portrait from \$200 up.

Mr. Kidder: I have no further questions of this witness, your Honor.

(Witness excused.)

The Court: We will take our afternoon recess. We will recess until 20 minutes after 3:00.

(Recess.) [34]

SHE MANG YIP

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: She Mang Yip.

Direct Examination

Q. (By Mr. Kidder): Mr. Yip, will you speak up so I can hear you and so the court and counsel can hear you? A. O.K.

Q. I believe we can conduct this in English. If

(Testimony of She Mang Yip.)

you don't understand, you turn to the interpreter there and perhaps he will explain the question to you, but we will try it in English.

Where do you live, Mr. Yip?

A. In San Francisco, in the Frank Hotel. It is on Kearny Street.

Q. What is your business or occupation? What do you do?

A. I am working in the newspaper office.

Q. In what office? A. Newspaper.

Q. Do you have any other occupation?

A. I go to school.

Q. Where do you go to school?

A. I go to school in the morning and I work part time [35] on the newspaper.

Q. Where do you go to school? A. Cal.

Q. University of California? A. Yes.

Q. At Berkeley? A. Yes.

Q. Where were you born?

A. China, Canton.

Q. Canton City? A. Yes, city.

Q. What is the date of your birth?

A. CR 15, December 15th, the 12th month in China, you know, the 12th month and the 15th.

Q. Do you know what American date that is?

A. Oh, yes.

Q. What is it?

A. January 7th, because I go to school and I have to use these dates, so I know.

The Court: January 7th what year?

Q. (By Mr. Kidder): What year?

(Testimony of She Mang Yip.)

A. 1928.

Q. You said you were born in Canton City?

A. Yes.

Q. Of what country are you a citizen? [36]

A. United States.

Q. How did you become a citizen of the United States?

A. Oh, because my father is a citizen.

Q. What is the name of your father?

A. Yip Share Leung.

Q. Is he the person who just testified before you?

A. Yes, my father.

The Court: Was that your father just testified?

The Witness: That's right, my father.

Q. (By Mr. Kidder): What is the name of your mother?

A. My mother?

Q. Yes. A. Chan Shee.

Q. Where was she born? A. Canton.

Q. Canton City? A. Yes.

Q. Is your mother living? A. No.

Q. When did your mother die?

A. It is in the wartimes, CR 33, around CR 33.

Q. Where did she die?

A. In Kin Mo Village.

Q. Have you ever lived in Kin Mo Village?

A. Yes, once, just a few days. [37]

Q. Have you ever actually lived in Kin Mo Village?

A. Yes. We have a home there. That is my uncle's home.

Q. When did you live in Kin Mo Village?

(Testimony of She Mang Yip.)

A. It is in the beginning of the war. It is about 1938, something like that.

The Court: Is that American?

The Witness: Yes.

Q. (By Mr. Kidder): How long did you live in Kin Mo Village?

A. Just a few days, about three or four days, something like that.

The Court: Three or four days?

The Witness: Yes, three or four days.

Q. (By Mr. Kidder): Where was your home before you went to Kin Mo Village, where did you live? A. In Canton.

Q. In Canton City?

A. Yes. We lived in Canton in the wartime beginning, and then we left Canton to go to Macao for a few months, and then we went to the village.

The Court: What year was this you went to the village for three or four days, what year?

The Witness: I think it is 1938, I think, because——

The Court: Can you give me the CR date?

The Witness: The CR is 27, about 27, yes. [38]

Q. (By Mr. Kidder): How old were you at that time? A. About 11 or 12.

Q. With whom did you go to the village, if anyone? You say you went to Kin Mo Village for three or four days. Who went there with you, if anyone?

A. Oh, my mama and my two brothers and sister.

(Testimony of She Mang Yip.)

Q. What were the names of your two brothers who went with you?

A. Yip Sue Kong and Yip See Sing.

Q. And the name of your sister?

A. Yip Lei Ha.

Mr. Kidder: Can you spell that, Mr. Interpreter?

The Witness: You can only spell it according to the sound.

The Interpreter: Different words have many pronunciations.

The Witness: Yes.

The Interpreter: L-a or L-a-y or L-a-i. It depends on the dialect, more or less, or L-e-i H-a-r.

Q. (By Mr. Kidder): These two brothers and the sister you have named, are they your full-blood brothers and sister? A. Yes.

Q. The same father and the same mother?

A. Yes, and I have—yes, that's right. You asked me the names of the brothers and sister. At that time we went [39] back to the village, the brothers and sister.

Q. Where did you stay in the village at that time?

A. Stay in my uncle's house, my grandma's house.

Q. Your grandmother's house? A. Yes.

Q. What was the name of your grandmother?

A. Grandmother is Wong See.

Q. You testified you only stayed there three or four days, is that correct? A. Yes.

(Testimony of She Mang Yip.)

Q. Who lives in your grandmother's house at the time, if anyone, besides your mother?

A. I think——

Q. Who lived there at your grandmother's house at the time?

A. My grandmother and the uncles.

Q. How many uncles?

A. Oh, at that time I think two of them, I think.

Q. What were their names?

A. You mean the name of my uncles?

Q. Yes. A. Yip Mie Jork.

Q. Who else? A. Yip Share Wong.

Q. How old were these two uncles at the time you visited [40] there?

A. At that time, my feeling, you know, at that time, the one is just a little bit higher than me, I think, and the other one is smaller, and I know they are just around my age, but they tell me one I am older than him, and the other one I am older than him about two years, I think.

Q. Are you older or younger than Yip Mie Jork? A. I am older.

Q. By about how much?

A. Just one year.

Q. What did you do in the village during the time you were there for three or four days?

A. Usually we just play around in the house with my uncles.

Q. Did you play with your uncle Yip Mie Jork?

A. Oh, yes, and Share Wong, too.

(Testimony of She Mang Yip.)

Q. Was there any incident that happened at that time that recalls this event to your mind?

A. I remember once we play together and he pushed me in the back, and then I fell down and something hurt me here, see, so I hurt here, and my mama put something in here, see, and that is why after a few days my mama take me to go back to Macao. Can you hear me?

Q. Do you have any mark from that incident?

A. Yes, I think here. [41]

Q. You are pointing to your right eyebrow?

A. Yes.

Q. The outside edge? A. Yes.

Mr. Kidder: May the record show what appears to be a scar at the edge of his right eyebrow?

The Court: The record may so show.

Q. (By Mr. Kidder): Where did you go after you left the village after this three or four days' stay, where did you go?

A. We went back to Macao.

Q. To Macao? A. Yes.

Q. Was that where you were living at the time?

A. Yes.

Q. You lived there with your mother?

A. Yes.

Q. And brothers and the sister that you named?

A. Yes.

Q. When did you come to the United States?

A. It is 1949, November. I forget the date. Yes, it was Thanksgiving Day, on that day.

(Testimony of She Mang Yip.)

Q. With whom did you come to the United States, if anyone?

A. My father and my stepmother.

Q. Your stepmother? [42] A. Yes.

Q. Has your father remarried?

A. What?

Q. Did your father remarry? A. Yes.

Q. How many times did you see your uncle Yip Mie Jork, how many times?

A. I think only once.

Q. Was that on the occasion you have spoken of at the village? A. Yes.

Q. I show you a photograph attached to Plaintiff's Exhibit 1, that is, incorporated therein, with a series of photographs, and point to the picture in the upper left-hand corner and ask you if you can identify the persons in this photograph.

A. Yes.

Q. Can you identify these people?

A. Yes, I know these people.

Q. Starting from the right of the photograph who is this person? A. This one?

Q. Yes. A. Mie Jork.

Q. Who is the person in the middle? [43]

A. My father.

Q. Who is the person on the left?

A. Share Wong.

Q. I show you another photograph marked as Plaintiff's Exhibit 5 and ask you if you can identify the persons in that photograph beginning on the right of the photograph.

(Testimony of She Mang Yip.)

A. This is Mie Jork, my father, and Share Wong.

Q. Where have you lived since your entry into the United States in 1949, where have you lived?

Mr. Dooley: Objection on the ground it is immaterial, irrelevant, incompetent.

The Court: Overruled.

Q. (By Mr. Kidder): Where have you lived since you came to the United States in 1949? Have you lived in the United States ever since you came here in 1949?

A. Oh, yes. In San Francisco.

Q. You haven't gone back to China since 1949?

A. No.

Mr. Kidder: Nothing further.

The Court: Step down.

(Witness withdrawn.)

The Court: Call in the next witness. [44]

PETER FONG

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Peter Fong.

Direct Examination

Q. (By Mr. Kidder): Where do you live, Mr. Fong?

A. I live at 9851½ Yale Street, Los Angeles.

Q. Where were you born?

(Testimony of Peter Fong.)

A. I was born in On Ngai Village, Canton.

Q. In what province? A. Canton.

Q. What is the date of your birth?

A. August 20, 1920.

The Court: Is that the English date?

The Witness: Yes.

The Court: August 20th.

Q. (By Mr. Kidder): When did you first come to the United States? A. 9-2-23.

Q. Have you lived in the United States ever since that time, has your home been here?

A. With the exception of two and a half years.

Q. Where were you then? [45]

A. I went back first to China in 1932 and came back in 1934 and again went back there in 1947, and the last time I went back in 1951.

The Court: You went in 1947. When did you come back?

The Witness: The same year.

The Court: The same year?

The Witness: Yes, sir.

The Court: The third time was when?

The Witness: 1951.

The Court: When did you come back?

The Witness: In 1951?

The Court: Yes.

The Witness: About a month later.

The Court: A month later?

The Witness: One month later.

Q. (By Mr. Kidder): How long were you in China in 1947? A. Three months.

(Testimony of Peter Fong.)

Q. Of what country are you a citizen, Mr. Fong?

A. United States.

Q. How did you become a United States citizen?

A. I was naturalized.

Q. When? A. In 1947.

Q. Where? A. In Los Angeles. [46]

Q. In the United States District Court?

A. Yes, sir.

Q. Are you acquainted with a person by the name of Yip Share Leung? A. Yes, sir.

Q. When did you first meet him?

A. In Los Angeles about 1946, when I first came down here.

Q. Where were you living before you came to Los Angeles? A. San Francisco.

Q. Where did you meet Mr. Yip Share Leung?

A. I was introduced to him through a mutual friend, Mr. Chin.

Q. Mr. Chin? A. Yes, sir.

Q. Where does Mr. Chin live?

A. He has an art curio shop in New Chinatown.

Q. Do you know the name of the shop?

A. Sincere Gift Shop.

Q. How often did you see Mr. Yip Share Leung?

A. I would say about once a week or so.

Q. Where did you see him?

A. Mostly in Sincere Gift Shop.

Q. You testified you went back to China about 1947. Do you recollect the month, approximately?

(Testimony of Peter Fong.)

A. I left San Francisco approximately the end of September.

Q. Where did you go on that trip to China?

A. I went back to Hongkong and then I went back to my home village.

Q. That is the village where you were born?

A. Yes, sir.

Q. Did you ever hear of Kin Mo Village?

A. Yes, sir.

Q. Where is Kin Mo Village?

A. About one English mile from my home place.

Q. Did you have a conversation with Mr. Yip Share Leung before you left the United States or Los Angeles about September 1947?

A. Yes, sir.

Q. Did he give you any articles to carry on your trip?

A. Yes, sir.

Q. What did he give you?

A. He gave me a letter and \$50.

Q. To whom was the letter addressed, if you know?

A. Addressed to his brother.

Q. What was the brother's name?

A. Yip Mie Jork.

Q. After you arrived in China, what did you do with this letter and money? [48]

A. I took it to Kin Mo Village.

Q. What happened there?

A. I gave it to Yip Mie Jork personally.

Q. Did you know Yip Mie Jork before you went to the village?

A. No, sir.

Q. Did you know the Yip family lived in Kin

(Testimony of Peter Fong.)

Mo Village at the time? A. I heard about it.

Q. Through whom?

A. Through Yip Share Leung.

Q. You stated you delivered this money and letter to Yip Mie Jork. Exactly where did you deliver this money and the letter?

A. At his house, his home.

Q. Where was this located?

A. Kin Mo Village.

Q. Did you have any difficulty finding Yip Mie Jork? A. Not very much.

Q. What did you do?

A. When I got there first I asked the way to his home and it turned up not very far from the gate where I was.

The Court: How old were you when you made this trip?

The Witness: In 1947, I was about 27 years old, sir.

The Court: How old was Yip Mie Jork when you saw him? [49]

The Witness: I didn't ask him, sir, but he was younger.

The Court: He was younger than you?

The Witness: Yes, sir.

The Court: Was he still a boy or was he grown up?

The Witness: I would say he was almost grown up by then.

The Court: Almost grown up?

(Testimony of Peter Fong.)

The Witness: Yes, sir. I did not ask him his age.

The Court: How long did you visit with him at this time?

The Witness: About 15 minutes.

The Court: About 15 minutes?

The Witness: Yes, sir.

The Court: That is the only time you saw him?

The Witness: Yes, sir.

Q. (By Mr. Kidder): Did you meet any other person at the house of Yip Mie Jork when you visited there in 1947?

A. Another fellow, a younger fellow there.

Q. Do you know who he was?

A. Yip Mie Jork told me it was his youngest brother.

Q. Do you know his name?

A. I don't think I can remember that.

Q. Was there any other person in the house that you met at that time? A. No, sir.

Q. I now show you a photograph attached to Plaintiff's Exhibit 1 of three persons, and ask you if you are able to [50] identify any of these three persons. The photograph is in the upper left-hand corner of the series of photographs. Can you identify any of these people in this photograph?

A. This is Yip Share Leung.

Q. The one in the middle? A. Yes.

Q. Can you identify anybody else?

A. This is Yip Mie Jork.

Q. The one on the right is Yip Mie Jork?

(Testimony of Peter Fong.)

A. Yes.

Q. Do you recognize the other person?

A. This one could be the younger brother, but I wouldn't swear to it, sir.

Q. You are not certain who that is?

A. No, sir.

Mr. Kidder: That's all. The plaintiff rests.

The Court: May I ask this witness a question?

Mr. Kidder: Certainly.

The Court: You were talking about where you were born. Is that close to Canton?

The Witness: About 40 miles from Hongkong, sir.

The Court: About 40 miles from Hongkong?

The Witness: Yes, sir.

The Court: Which way from Hongkong?

The Witness: Oh, I would say northeast. [51]

The Court: To go from Hongkong to your village, did you go by boat or train?

The Witness: Boat, sir.

The Court: What river did you cross?

The Witness: I wouldn't know, sir. My brother took me.

The Court: In going to your village, did you go to Canton first?

The Witness: No, sir. Kowloon.

The Court: Did you go to Macao?

The Witness: When I came back to Hongkong, I went by way of Macao.

The Court: You go to Hongkong, and you go

(Testimony of Peter Fong.)

to China, and then you go from Hongkong to your village.

The Witness: Yes, sir.

The Court: You say your village was northwest?

The Witness: No. Hongkong is northwest.

The Court: Did you have to cross any streams or bays?

The Witness: Yes, sir.

The Court: Do you know what stream?

The Witness: I wouldn't know, sir.

The Court: How old were you?

The Witness: I was about 27.

The Court: You say you went back to the village in 1947?

The Witness: Yes.

The Court: How old were you then? [52]

The Witness: About 27.

The Court: You go to Hongkong. From Hongkong you go to your village. You are 27 years of age. How did you go?

The Witness: By steamboat.

The Court: Where do you take the steamboat to?

The Witness: Steamboat in Kowloon. That is the inland city there. I change boats there.

The Court: Then where did you go?

The Witness: From Kowloon I take another steamer to my village.

The Court: To your village?

The Witness: That is the marketplace there.

(Testimony of Peter Fong.)

The Court: How far is your village from Canton?

The Witness: About 40 miles.

The Court: How far is it from Macao?

The Witness: I would say about the same distance. You can take either way.

The Court: Did you ever see a map of Hongkong Harbor?

The Witness: Oh, yes.

The Court: I want to show you this map. Here is Hongkong. Here is Canton.

The Witness: Yes.

The Court: Where is your village, where was your village?

The Witness: Chung Shan District, about there.

The Court: It would be north of Macao? [53]

The Witness: I wouldn't say north of Macao. Right here; about northwest of Macao.

The Court: Going to Hongkong from your village, you didn't take the steamer to Macao.

The Witness: Yes, to Kowloon.

The Court: Your village was how far?

The Witness: My village is inside the Chung Shan District.

The Court: You said your village was how far from Kin Mo?

The Witness: About one mile, English mile, sir.

The Court: How far was your village from the coast, seacoast?

The Witness: You mean Hongkong or Kowloon?

The Court : Down to the seacoast. You say your

(Testimony of Peter Fong.)

village is up in here. How far was it down to the ocean?

The Witness: About 40 miles, sir.

The Court: Do you want to look at the map?

Mr. Kidder: Yes.

The Court: It is a National Geographic map.

The Witness: If you ask me about the distance, I wouldn't know, sir.

Q. (By Mr. Kidder): Where did you say your village is located?

A. Chung Shan District.

The Court: About halfway between Macao and Hongkong. [54]

The Witness: So when we go to Hongkong, we either take the boat to Kowloon or from there to Hongkong, or we go to Macao and from there take a boat to Hongkong, either way we can go.

Q. (By Mr. Kidder): Is it possible to get to your village or in the vicinity of Kin Mo Village by going from Hongkong to Macao and then to the village? Is it possible to go from here to here?

A. Yes, sir.

Q. How do you travel?

A. My brother took me. He bought all the tickets. I wouldn't know anything about that. I was away almost 15 years.

Q. 1947 how did you travel? Did you go back by yourself? A. Yes.

Q. How did you travel? Did you arrive at Hongkong? A. Yes.

(Testimony of Peter Fong.)

Q. How did you get to the village?

A. By boat to Kongmoon, the city there on the coast. I couldn't find it on the map there.

Q. Then did you take the boat——

A. You can take a steamboat or junk. I don't know how to describe it.

Q. How did you go this last time from Hongkong to your village? [55]

A. In 1947?

Q. Yes. A. By boat.

Q. All the way? A. All the way.

Q. When you get off the boat, how far is it to your village?

A. I would say about two or three miles.

Q. Two or three miles. In other words, you can travel by boat almost all the way to your village?

A. Yes, sir. It is a little rivulet or something like that.

Q. Do you know the name of it?

A. No, sir.

Q. Is it possible to travel from Hongkong to Macao and then to that vicinity?

A. Oh, yes. I did that once.

Q. By boat?

A. Yes, sir. It took about three hours from Macao to Hongkong.

Mr. Kidder: The plaintiff rests.

(Witness withdrawn.)

The Court: It is 4:00 o'clock, but I would like to call the first witness back to the stand. [56]

SHARE LEUNG YIP

recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

Examination

Q. (By the Court): I want to be sure I understand what you said.

A. About the map?

Q. Yes. A. Yes.

Q. You told me before when you were at Hongkong you went over to Macao and I asked you where the village was, and you told me it was down in here.

A. Say this is Macao and there is a little island here some place. Well, actually it isn't too far, but there is some boat, a Chinese boat, and there you take the boat overnight.

Q. It is down here on the coast somewhere?

A. Yes, it is part of Chung Shan, you know, Macao, Chung Shan District. It is around some place right here.

Q. Down here on the coast? A. Yes.

Q. Do you know where Canton is?

A. Yes.

Q. Your village was not between Canton City and Macao.

A. You cannot go there (indicating). [57]

Q. You told me the village was down there.

A. But there is no boat to go there. You have to go to Macao, then Canton, or go to Hongkong to Canton.

(Testimony of Share Leung Yip.)

Q. What was the name of this last village? Do you know this On—— A. On Ngai.

Q. On Ngai, do you know where that is? Do you know the boy who was here?

A. Yes.

Q. What is his village? A. On Ngai.

Q. How far was that from your village?

A. About one English mile, one mile.

Q. Where was that on this map?

A. Well, here is Macao, and On Ngai is up here, up north from my village, northeast or something.

Q. His village was down in here, was it?

A. Yes.

The Court: I wanted to be sure as to what you were testifying to before we quit tonight. I wanted to know for sure.

Mr. Kidder: Let me ask a question.

Further Direct Examination

Q. (By Mr. Kidder): Mr. Yip, this is Macao?

A. Yes. [58]

Q. Apparently north of Macao is the City of Canton, is that right? A. That's right.

Q. Where is the village with respect to these two cities?

A. In between there. It is on the coast. The village is on the coast. Macao is on the coast and it is on the left inside coast, see. This is where the village is.

Q. What was the nearest large city to the village? A. Macao.

(Testimony of Share Leung Yip.)

Q. Macao is the nearest large city?

A. Yes.

Q. How long did it take to get from the village to Macao?

A. Village to Macao, overnight on boat.

Q. How long did it take to go from the village to Canton?

A. You have to go to Macao first.

Q. Go to Macao first?

A. Yes, that is definite.

Q. Why?

A. Because you have no boat, no boat from my village to Canton direct. You have to go to Macao to go to Canton or go to Macao and then to Hong-kong, or you take a boat or train to Canton.

Q. How long did you say it takes to go from the village [59] to Macao?

A. About overnight.

Q. And by what means? A. Boat.

Q. Which direction does the boat sail, if you know?

A. That is something I don't know.

Mr. Kidder: I will withdraw that.

The Court: These witnesses are pretty good, but I don't think they are that good.

Q. (By Mr. Kidder): Let me ask you this. Is this village south of Macao or is it between Canton and Macao?

A. Well, right here, it is some place here, but I left the village for so long, what the direction is,

(Testimony of Share Leung Yip.)

I don't know, but that is my imagination to be here, because I—how do I know exactly when I was 12 years of age.

Q. When were you last in the village?

A. 12 years of age.

Q. When you were 12 years of age?

A. Yes.

The Court: It is 4:00 o'clock and I suppose we can't complete this case tonight, so we will recess until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken to 10:00 o'clock a.m., Tuesday, May 3, 1955.) [60]

Tuesday, May 3, 1955, 10:00 a.m.

The Clerk: No. 2, 14967-HW Civil, Yip Mie Jork vs. John Foster Dulles, Secretary of State, further trial.

The Court: Mr. Kidder, last night you said you rested, but I won't hold you to that.

Mr. Kidder: We rest.

SHARE LEUNG YIP

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination

Q. (By Mr. Dooley): Mr. Yip, I understand from your testimony yesterday that you were quite young when your father remarried, is that correct?

A. My father what?

Q. When your father remarried.

A. Quite young, yes.

(Testimony of Share Leung Yip.)

Q. I understand that you don't recall the date of his remarriage, is that correct?

A. That is correct.

Q. And you left Kin Mo Village when you were 12 years of age, is that correct?

A. That is correct. [62]

Q. And you went back to China in 1926.

A. 1926, correct; CR 15, yes.

Q. And you came back to the United States in 1931, is that correct?

The Court: No. He returned in 1929. He went in 1926 and came back in 1929, according to my record.

The Witness: The Republic of China, it is 20 years.

Mr. Dooley: My recollection, your Honor, is that he said CR 20, which, according to the book, is 1931.

The Court: 1931? Let me have the file.

Q. (By Mr. Dooley): Between 1931 and 1947, you did not receive any correspondence from Yip Mie Jork, is that correct?

A. Well, in wartime, no, but I received after the war, I received a letter that he was in Hongkong now.

Q. That was at the time that Yip Mie Jork was in Hongkong, is that correct?

A. That is correct.

Q. In what year was that?

A. Well, 1952, 1953 and 1954 I received some letters from him.

(Testimony of Share Leung Yip.)

Q. So the first time you received correspondence from Yip Mie Jork was in 1952.

A. Yes, around that time.

Q. That was after you had seen Yip Mie Jork in Macao in 1949. [63]

A. Yes, that is it.

Q. You didn't receive any photographs of Yip Mie Jork between 1931 and 1949?

A. No. Only I have the photo I took in 1949.

Q. 1949 was the first time you had ever seen a photograph?

A. Yes.

Q. In 1947, you made a trip to China again, is that correct?

A. 1947, yes.

Q. What month did you leave in 1947, Mr. Yip?

A. I think about the 10th month of 1947 I go back. I arrived at Hongkong, I think it is September—December.

Q. And had you planned this trip in advance?

A. I always like to go back to China to paint, as I said yesterday, but in the wartime I cannot go until after the war.

Q. And when did you decide to make the 1947 trip?

A. I make my decision around before just about a couple of weeks, three weeks before I left San Francisco.

Q. When was the first time you wrote a letter to Yip Mie Jork?

A. Well, about a few days I left Hongkong to Macao.

The Court: You didn't write until after you got to Hongkong?

(Testimony of Share Leung Yip.)

The Witness: What's that? [64]

The Court: You didn't write until after you got to Hongkong?

The Witness: No.

Q. (By Mr. Dooley): And what year was that?

A. 1949.

Q. Did you receive any letters between 1931 and 1947 from your stepmother?

A. This means—what years, sir?

Q. From 1931 to 1947.

A. No. In 1931 I was in Canton, yes, and at that time I receive a letter.

Q. After your return to the United States in 1931, did you receive any more letters?

A. No.

Q. Did you receive any letters from Yip Share Wong between 1931 and 1947? A. No.

Q. You testified yesterday you gave \$50 to Mr. Peter Fong, is that correct?

A. Yes, that's right.

Q. Where were you at the time you gave him that \$50?

The Court: Was it \$50?

The Witness: Yes, it was \$50.

The Court: I thought Peter Fong said it was \$25. My notes say \$25. [65]

Mr. Kidder: It was because of the pronunciation, your Honor. I thought at first he said 15 and it wasn't quite distinct.

The Court: It was \$50, was it?

The Witness: \$50.

(Testimony of Share Leung Yip.)

The Court: All right.

Q. (By Mr. Dooley): Where were you at the time?
A. In New Chinatown.

Q. That was in the United States?

A. United States, that's right, in Los Angeles.

Q. Did you give him anything else besides the \$50?
A. A letter.

Q. Mr. Yip, how did you know that Yip Mie Jork was still in Kin Mo Village?

A. Why not? He was in China. I left China and they went back to the village, Kin Mo Village.

Q. You had never seen Yip Mie Jork.

A. I saw Yip Mie Jork.

The Court: When did you see him?

The Witness: In 1949.

Q. (By Mr. Dooley): That was after you sent the money, is that correct?
A. After?

Q. After, it was only after you gave the money to Mr. Peter Fong that you saw Yip Mie Jork. [66]

A. I was here. I gave the money to Peter Fong to send back to him.

The Court: According to your testimony yesterday, you returned to China in 1947.

The Witness: Yes, sir.

The Court: You couldn't tell us the date, the month. You just said it was sometime in 1947. According to Peter Fong, he went to China in 1947, too.

The Witness: Yes.

The Court: Did he go before you or after?

The Witness: He go before me. You want me

(Testimony of Share Leung Yip.)

to give the association? I met him in Chinatown and then he told me he go back to China soon. I think, well, at that time I, you know, I didn't make up my mind to go back or not, and then I give him \$50 and the letter to him.

The Court: How many months before you went to China did Peter Fong go to China?

The Witness: I think we both went in about a month.

The Court: One month apart?

The Witness: Yes.

The Court: In other words, you gave to Peter Fong \$50 to take to your brother in China and you went to China yourself a month later.

The Witness: That is how it is, yes.

Q. (By Mr. Dooley): How did you know Yip Mie Jork needed [67] money?

A. Well, in Chinese custom they send the money anyway. So I send \$50. I know in the village——

The Court: This is the first money you sent, isn't it?

The Witness: Yes.

The Court: You never sent any money between 1931 and 1947?

The Witness: That is wartime. It can't go through.

The Court: You never sent any money at all until you sent this \$50 in 1947?

The Witness: Yes, that's it.

Q. (By Mr. Dooley): You heard no word at

(Testimony of Share Leung Yip.)

all from Yip Mie Jork between 1931 and 1947, isn't that right?

The Court: He has testified to that two or three times. Mr. Dooley, let's don't repeat. I have got an attorney that is waiting here.

Q. (By Mr. Dooley): Did you give Mr. Fong any money for anyone else in China?

A. Well, I send the \$50 to my two half-brothers, that's all.

Q. At that time didn't you have some children in China, Mr. Yip? A. What?

Q. Did you have any children in China at that time? A. Yes. [68]

Q. You didn't send any money to your children?

A. Well, yes, I did, after the war.

Q. You didn't give any money to Mr. Peter Fong to give to your children?

A. No, not for the children.

Q. In 1947, after you got to China, did you see Mr. Peter Fong in China? A. No.

Q. When was the next time you heard from Mr. Peter Fong?

A. Until now? When he came back from China, I was in this country.

Q. You didn't write to him? A. No.

Q. And he didn't write to you? A. No.

Q. How did you know that Yip Mie Jork received the \$50, Mr. Yip?

A. Well, I trust a friend, and I knew he received the \$50 I sent back.

(Testimony of Share Leung Yip.)

Q. But he didn't write and tell you he had delivered it. A. No, he didn't.

Q. After you got to China, it was two years before you saw Yip Mie Jork, is that correct?

A. The last time, yes, I see him in 1949. [69]

Q. Your mother was buried in Kin Mo Village, was she not? A. She was.

Q. And you have a wife that has died, too.

A. My wife passed away, too.

Q. She is buried in Kin Mo Village?

A. Yes.

Q. How long would it have taken you, Mr. Yip, to go to Kin Mo Village?

The Court: From Hongkong?

Q. (By Mr. Dooley): From Hongkong.

A. Well, from Hongkong I go to Macao, four or five hours, and then from Macao you take a boat overnight.

Q. Didn't you wish to see the grave of your wife? A. No.

Q. Mr. Yip, are you sure that you saw Yip Mie Jork in 1949? A. Positive, yes.

Q. Have you ever testified differently at any other time?

A. No. I see him in Macao in 1949.

Q. Do you remember testifying before the Immigration Service in 1949?

A. I don't know what they put down.

The Court: Those are already in evidence. [70]

Mr. Dooley: Yes, your Honor. I would like to question him concerning this.

(Testimony of Share Leung Yip.)

The Court: He has testified he talked to his brother. If you have got any testimony to the contrary, all you have to do is read it.

Mr. Dooley: I will do that, your Honor. Your Honor, I would like to read the testimony given by Yip Share Leung December 8, 1949, before the Immigration and Naturalization Service. I will read three questions and answers.

“Q. Where is your oldest half-brother, Yip Jeang Shing at the present time?

“A. I don’t know. I didn’t see him in China on this trip.

“Q. Where is your half-brother Yip Mie Jork?

“A. He is in Kin Mo Village, but I didn’t see him on this trip either.

“Q. Where is your half-brother Yip Share Wong at the present time?

“A. He is also in the village. However I didn’t see him.”

The Witness: I might say what I have seen in Kin Mo Village. I never saw them in the village, but I see them in 1949 in Macao, but they didn’t ask if I see them in Macao.

Mr. Dooley: No further questions. [71]

Redirect Examination

Q. (By Mr. Kidder): Mr. Yip, where were your children residing in 1947 when you went to China? A. Where? They were in Canton.

Q. In Canton City? A. Yes.

Q. How soon did you see your children after your arrival in China?

(Testimony of Share Leung Yip.)

A. Well, when I write to them immediately, they come down to see me.

Q. Where did they come to see you?

A. They come to Hongkong to see me.

Q. You met your children in Hongkong?

A. Yes, sir.

Q. Did you see your children at any other time during the time you were in China between 1947 and 1949?

A. No. I see them when I first arrive in Hongkong.

Q. You did testify that you saw them just before you left China to return to the United States, is that right? A. Yes.

Q. Have you been supporting these children in China? A. No.

Q. Do you send money to these children in China? A. No. [72]

Q. By whom are they supported?

A. I understand they are working in Canton.

Q. They support themselves?

A. They support themselves.

Q. Did you testify that you left the United States in 1947 about December? A. Yes.

Q. That is when you boarded the ship in San Francisco? A. Yes.

Q. Do you know when Peter Fong left the United States, the date when he left the United States before you did in 1947?

A. Yes. I think he left before I did.

Q. Do you know when he left?

(Testimony of Share Leung Yip.)

A. I don't know, but he told me at that time he would go back to China.

Q. Do you know whether he had returned to the United States before you left in December 1947? A. No.

Q. You testified you did not go to Kin Mo Village on this trip to China between 1947 and 1949?

A. No.

Q. Is there any reason why you did not go to the village?

A. Well, I plan to go back to China and then I go to paint, and I go to paint in the city and then I go to Shanghai [73] immediately and Nanking and return to Hongkong.

Q. The purpose of your trip was to paint, is that correct? A. To paint, that is correct.

Q. There has been read to you certain questions and answers from Plaintiff's Exhibit No. 4, which questions and answers are contained on page 3 of this transcript of statement. Is this your signature there? A. Yes, sir.

Q. Was this signed by you?

A. It is signed by me.

Q. Was it signed by you after it was transcribed? A. After I gave my statement.

Q. Was it read to you before you signed it?

A. No.

Q. The photographs that are in evidence, particularly Plaintiff's Exhibit 5, was that taken in Macao?

A. Yes, taken in Macao, the picture.

(Testimony of Share Leung Yip.)

Q. Those pictures were taken with your half-brother, is that right? A. Yes.

The Court: That was testified to yesterday. No questions were asked on cross examination about these photographs. There is no contradiction of the testimony of this witness about the photographs.

Mr. Kidder: I have no further questions.

(Witness excused.)

SHE MANG YIP

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination

Q. (By Mr. Dooley): Mr. Yip, yesterday I believe you testified you went to Kin Mo Village in about 1938, is that correct? A. I think about.

The Court: CR 27?

The Witness: Yes, I think so.

Q. (By Mr. Dooley): You are not sure?

A. Well, I come from there because beginning of the wartime, the second time, see. It is 1937, and then because of wartime we have to leave there, see, and when we leave there, the next year we leave there is 1938. It must be CR 27.

Q. You were born in 1928, is that correct?

A. Yes.

Q. So yesterday you testified you were 11 or 12 years of age. Was that American or Chinese?

A. 11 and 12? You mean the age?

(Testimony of She Mang Yip.)

Q. At the time that you went to Kin Mo Village, approximately how old were you? [75]

A. Oh, I am about 11 or 12, around there. You mean counting from my birthday?

Q. Yes.

A. Yes. I don't have to at that time remember how old I am at the time, so you ask me and I just remember about the time.

Q. Where were you living at the time you started the trip?

A. What? Oh, you mean before we go to the village?

Q. Yes. A. In Macao.

The Court: You were living in Macao?

The Witness: Oh, we came from Canton to Macao first, and then from Macao to the village.

The Court: But you were living in Canton.

The Witness: Yes.

The Court: That was your home.

The Witness: Yes, because we have to move, I mean we have to move to Macao at that time, you know.

The Court: How long did you stay in Macao?

The Witness: Until victory, after the war.

The Court: How many years or months?

The Witness: How many years?

The Court: Yes.

The Witness: 1938 until 1945. [76]

The Court: Then you lived in Canton City until 1938, is that right?

The Witness: Yes.

(Testimony of She Mang Yip.)

The Court: Then in 1938 you moved to Macao.

The Witness: Yes.

The Court: And lived there until 1945.

The Witness: The first year when we arrive to Macao, we went to the village once.

The Court: Then you went to the village after you got down to Macao.

The Witness: Yes.

The Court: How long were you in Macao before you went to the village?

The Witness: About two months.

The Court: About what?

The Witness: A few months.

Q. (By Mr. Dooley): I believe you stated that your two brothers and your sister went along with you.

A. You mean to the village?

Q. To the village, Kin Mo Village.

A. Yes.

Q. How large a boat did you go on?

A. What?

Q. How large was the boat you went on?

A. Oh, it isn't too big. Just small boat, about—I [77] couldn't remember exactly, but a small boat. Might be wood, you know. I can't tell you exactly.

The Court: He was 11 or 12 years of age then. I don't know how he could remember a lot of details. He was just a youngster when he went on this trip.

Mr. Dooley: I agree with you.

Q. Were there any other children your age on the boat?

A. What do you mean?

(Testimony of She Mang Yip.)

Q. Were there any other boys your age on the boat when you went to Kin Mo Village?

A. I have my brothers, one or two years.

Q. Were there any others?

A. I couldn't remember. Maybe. You mean in the house? Yes, there must be, but I couldn't remember. I didn't count them.

Q. Did you play with any of the other boys on the boat?

A. Oh, no. Yes, sometimes I just walk around, but my mother doesn't let me go out. She want to keep us, you know, the boys here.

The Court: Mr. Dooley, you are going far afield. This boat trip was taken when this witness was 10 or 11 years of age, or 12. Now you ask him with whom he played on the boat. I think you are asking for the impossible.

Mr. Dooley: Yet, your Honor, we have the witness remembering a picture. [78]

The Court: Yes, I know, but that goes to the credibility of the witness.

Mr. Dooley: That is what I was trying to bring out, your Honor.

Q. After you got to Kin Mo Village, how many boys were there in the house that you lived in?

A. How many boys? We are three brothers and sister—oh, you mean boys, not counting the sister. Three boys and two uncles. Five together.

Q. Did you go around the village any?

A. No.

Q. You stayed in the house all the time?

(Testimony of She Mang Yip.)

A. Not exactly in the house. Sometimes in the front of the house and around there.

Q. Mr. Yip, I show you Plaintiff's Exhibit 5.

A. Yes.

Q. I ask you when was the first time you saw this picture.

A. This picture? This picture, in Hongkong before I came to America.

The Court: You saw it in Hongkong. When did you come to America then?

The Witness: What?

The Court: When did you come to America? You say you saw it before you came to America.

The Witness: Yes.

The Court: When did you come to America?

The Witness: 1949, November 20—I couldn't remember 20 what, but Thanksgiving Day is the day I arrived here.

The Court: You came to the United States in 1949?

The Witness: Yes.

The Court: And you saw that picture before you came to the United States.

The Witness: Yes.

Q. (By Mr. Dooley): Where did you see that picture for the first time? A. In Hongkong.

Q. In Hongkong. Did anyone show you the picture?

A. Oh, my father told me, because they had taken the picture in Macao, you know, so they have the picture. Then we look again and we see it,

(Testimony of She Mang Yip.)

because this is our family, you know, so he has the picture and I see it.

Q. Did your father tell you where the picture was taken?

A. In Macao. He didn't exactly tell me this one. I know he went to Macao and come back, see, and I don't remember which way. We saw the picture. I mean I saw the picture.

Q. He told you he had been to Macao?

A. At that time I was there. At that time I was there.

Q. You were in Macao?

A. No, in Hongkong, and then he went to Macao.

Q. Then when he came back from Macao, did he tell you he had taken a picture?

A. He didn't say that, but he has something, because when he come back, we have something, you know, maybe just look at something, just like that. He not say, "Oh, I want to show you some pictures or this one." I don't know exactly—how can I say it? But at this time I saw this one.

Q. He was just talking about his trip in general, is that correct?

A. He didn't talk too much, because he says, "I went to Macao to meet my brothers." That's all.

Q. Do you know where at Macao this picture was taken?

A. It is in the hotel like that. I don't know this background. I don't know. Maybe it is—I don't know what it is here. Even maybe in Los Angeles or some place sometimes you have been there, but

(Testimony of She Mang Yip.)

in the picture you cannot tell it. If I went to Macao, I could tell it, maybe. I have been in Macao and I know many places there, but I can't tell this picture.

Q. How did you learn the picture was taken in Macao?

A. Learn? What do you mean "learn"?

Q. How did you find out that the picture was taken in Macao?

A. Well, before we didn't have this picture. Then after my father come back, they have the picture, see, he has the [81] picture. I know he went to Macao to meet my uncles, so it must be in Macao. That is my guess. It must be.

Q. Did you ever discuss this picture with your father?

A. No. We just take a look, that's all.

Q. I am pointing to Plaintiff's Exhibit 5, the boy on the right of the picture. A. Yes.

Q. Who is that?

A. This one? This is my uncle. You mean the name?

Q. The name. A. Mie Jork.

Q. And this? A. Share Wong.

Q. Do you know how old they were at the time that picture was taken?

The Court: How would he know?

The Witness: You let me count and I can count it for you.

Mr. Dooley: I withdraw the question.

(Testimony of She Mang Yip.)

The Court: He doesn't know anything about that. All the information he has is pure hearsay.

The Witness: Yes.

The Court: Why waste the time.

Mr. Dooley: Thank you, your Honor.

The Court: All the information he has about these pictures is what his father told him. He has no personal knowledge [82] of these pictures at all. It is all hearsay.

Mr. Dooley: I have one or two more questions.

Q. At the time you went to Kin Mo Village in 1938, was Yip Mie Jork attending school?

A. At that time?

The Court: He was only there three or four days.

The Witness: I don't remember whether he go to school or not.

The Court: It might have been a week end or a holiday. He wouldn't know whether he was attending school or not.

Mr. Dooley: No further questions.

Mr. Kidder: I have only one question.

Redirect Examination

Q. (By Mr. Kidder): Were you present when this photograph, Plaintiff's Exhibit 5, was taken?

A. There?

Q. Yes.

A. You mean I have been there?

Q. Were you there when it was taken?

A. I was in Hongkong.

(Testimony of She Mang Yip.)

Q. You were not there?

A. No. This is Macao and I was in Hongkong.

Mr. Kidder: That's all.

(Witness excused.) [83]

The Court: Call the other witness.

PETER FONG

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

The Court: May I ask this witness a question?

When the witness who just left the stand gave you some money to take over to China, how much was it?

The Witness: \$50, sir.

The Court: \$50?

The Witness: That's right.

The Court: All right.

Cross Examination

Q. (By Mr. Dooley): Mr. Fong, where were you at the time that you received this \$50?

A. I was in the Sincere Gift Shop.

Q. That is in the United States?

A. Yes, sir.

Q. At the time that you received this money, did Yip Share Leung tell you he intended to go to China in 1947?

A. He said he intended to, but he didn't know when.

The Court: Wait a minute. Well, that's my mistake. Go ahead. Will you read the answer?

(Testimony of Peter Fong.)

(Answer read.) [84]

Q. (By Mr. Dooley): Did you see Yip Share Leung in China during 1947? A. No, sir.

Q. You only remained in China three months, is that correct? A. Yes, sir.

Q. Did you write to Yip Share Leung while you were in China? A. No, sir.

Q. Did he write to you? A. No, sir.

Q. When was the next time you saw him?

A. About 1951 or '52. I forget the exact date.

Q. About four years later? A. Yes, sir.

Q. Had you received any letters from him during that period of time? A. No, sir.

Q. Had you written him any letters?

A. No, sir.

Q. The letter that he gave you, did it have an address on it?

A. It was addressed to Yip Mie Jork.

The Court: Any city?

The Witness: Kin Mo Village. [85]

Q. (By Mr. Dooley): How many places did you visit during your trip to China in 1947?

A. Hongkong, Macao, Kowloon, and my village, and Canton.

The Court: Did you go to Canton?

The Witness: Yes, sir.

Q. (By Mr. Dooley): Did you visit any persons in China during those trips?

A. Just my relatives.

Q. How many different houses did you go to?

A. In my village, sir?

(Testimony of Peter Fong.)

Q. No, the relatives that you visited.

A. My mother and brothers, that's all.

Q. Where were they living?

A. In On Ngai Village.

Q. That is your home village?

A. Yes, sir.

Q. Did you visit in Hongkong anyone?

A. No. I just stayed there. My brother took me there and we were just sightseeing and going some places, that's all. I forget where they are now.

Q. Did you visit in Macao?

A. No. We just stayed overnight.

Q. Did you take gifts to anyone else other than Yip Mie Jork when you went to China?

A. I didn't bring them from the United States, but when [86] I got to Hongkong, I got some gifts for my mother and sisters-in-law and brother.

Q. Is your brother married? A. Yes, sir.

Q. Does he have any children? A. Two.

Q. How old were his children in 1947?

Mr. Kidder: Your Honor, I am going to object. I believe this is immaterial.

The Court: Sustained. What difference does it make, Mr. Dooley? This witness went down to the village. He talked with the plaintiff for about 15 minutes. That's all he knows. Unless you are trying to test his credibility by asking him about his own children——

Mr. Dooley: I am going to point out the various places he had been during the trip and the improbability of his being able to remember a person he

(Testimony of Peter Fong.)

had only talked to for 15 minutes, but I will withdraw the question. No further questions.

Redirect Examination

Q. (By Mr. Kidder): Mr. Fong, you testified you left the United States in 1947. Do you remember the date, the exact date when you left the United States?

A. That was the latter part of September, but exactly, I wouldn't know. [87]

Q. The latter part of September?

A. Yes, sir.

Q. When did you return to the United States?

A. December 18th.

Q. In the same year?

A. Same year, sir.

Mr. Kidder: That's all.

(Witness excused.)

The Court: Mr. Dooley, have you any other testimony?

Mr. Dooley: Just a moment, your Honor. I would like to recall Mr. Yip Share Leung for one or two questions. Well, I will withdraw that, your Honor.

The Court: Do you have anything else, Mr. Kidder?

Mr. Kidder: No further evidence, your Honor.

The Court: Well, Mr. Kidder, I thought this from the very beginning, it takes more than you have got here to establish paternity.

Mr. Kidder: Of course, we have offered the best evidence available.

The Court: You have offered all the evidence you have, but the burden is upon you. I don't think there is any question you have done the best you can with the material you have. What have we got?

We have got the half brother of the plaintiff. When he is 22 years of age, he goes down to Macao and he says he recognizes [88] the plaintiff. I can't understand that at all. He never saw the plaintiff at all until he was 22 years of age. He talked to him, he comes from the village, he talked to him about the family and all that, but that doesn't establish paternity.

Your other witness, She Mang Yip, he says he was 11 or 12, his own testimony shows he was 10, according to the years, when he went there and when he was born, but he went there and stayed for three or four days in the village. He saw a couple of boys in the house. That doesn't establish paternity at all.

Then the last witness, Peter Fong, saw the plaintiff 15 minutes in 1947. The plaintiff was then 20 years of age.

The government has a hard time winning any of these cases, and they only win them when the plaintiff doesn't produce any evidence. If the plaintiff has any evidence, the government can't win.

Mr. Kidder: Your Honor will take cognizance that we are denied at least the plaintiff's presence, which might go a long way toward establishing our

case. We have no opportunity to have the plaintiff here.

The Court: That may be perfectly true, and I would like to see these plaintiffs come over here to testify, but the government doesn't see eye to eye with us, so we have got to do the best we can.

Mr. Kidder: At least we have the testimony from the second [89] witness that he saw the boy in the family home in 1938.

The Court: That doesn't mean anything. According to Mar Gong, I can't take cognizance of things I find out in other cases, but, you know, all the testimony we have had in these cases indicates there is a family home. All the brothers go back to that family home. They marry and bring their wives there and raise their children there in the family home. So in that home there may be two or three different families. Just because one boy appears there is no indication he belongs to a certain papa and mama.

Mr. Kidder: Of course, we have here a unique situation where the parents are dead and where, of course, the father died.

The Court: It is possible for this plaintiff to be admitted under the new procedure. He may be able to find someone who can testify, someone in the village who can go down and testify as to his living in the village all the time, living with this particular woman, called her mama, he was recognized as the son, but we haven't got anybody here who can testify they watched this boy grow up.

The first thing we know about this boy was from

the second witness. He went down to the village. He said he was 11 or 12 years of age. The plaintiff then was about two years younger.

Mr. Kidder: One year, I believe, your Honor.

The Court: There is a lapse from birth for 10 years. No [90] testimony at all of what happened. The next thing we have is in 1947.

Mr. Kidder: That's right.

The Court: There is a lapse of another 10 years or nine years.

Mr. Kidder: You have before the court, your Honor, the files of the Immigration Service, one of which is the file of the father. It shows that in 1929 when he came back shortly before his death, I believe, it contains the name of the son, the plaintiff, Yip Mie Jork.

The Court: I don't doubt there was a child born to this father and to the then mama by the name of the plaintiff. I don't doubt that. But I just don't think you have established by any competent testimony at all that the plaintiff now who is filing this complaint and demands he be recognized as the son of the alleged plaintiff, is that person. It is nothing more than conjecture.

Mr. Kidder: I would say it goes further than that.

The Court: All we have here is the testimony of witnesses who can't remember, they don't know, they think, they are not sure as to dates, they are not certain. You know, I am not questioning the credibility of the witnesses, I am not basing this upon the credibility of the witnesses, but I am bas-

ing it upon the question of whether or not, even assuming that the half brother saw the plaintiff when he was 22 years of age, and [91] I don't think that is enough, even assuming that Share Mang Hip saw the boy when he was 10 years of age or 11 years of age, I don't think that is enough. Even assuming that Peter Fong saw somebody he claimed to be the plaintiff for 15 minutes in 1947, when the boy was 20 years of age, that is not enough.

Mr. Kidder: Of course, that is the substance of our evidence. We have none better.

The Court: You cannot make a case when you don't have one, that is certain. You can't do it. You just don't have the testimony.

I will hold that you have not sustained the burden. Judgment will be for the defendant.

Court will stand in recess until 10 minutes after 11:00.

Mr. Dooley, in this case we just completed, when you prepare your findings, prepare them on the basis the plaintiff has not sustained the burden of proof. I don't want to make a finding he is not a national, because I don't know. He hasn't established he is a national.

And, Mr. Dooley, within 10 days let us have the findings. [92]

July 18, 1955, 10:00 o'clock a.m.

The Clerk: No. 6, 14967, Yip Mie Jork vs. John Foster Dulles, further proceedings.

Mr. Kidder: Ready, your Honor.

The Court: Have we an interpreter?

Mr. Kidder: Yes.

The Court: Swear the interpreter.

(Whereupon, Lily L. Chan was duly sworn to interpret the Chinese language into English and the English language into Chinese.)

Mr. Davis: Your Honor, I wonder if we might have a short voir dire examination of the Interpreter?

The Court: All right.

LILY L. CHAN

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Davis): Mrs. Chan, do you know the plaintiff in this case, Yip Mie Jork?

A. No.

Q. Do you know any of the witnesses who are to appear for the plaintiff?

A. No. Are these the people? [94]

Mr. Kidder: Yes.

The Witness: No.

Q. (By Mr. Davis): Have you discussed this case with any of the witnesses who are to appear for the plaintiff? A. No.

Q. Have you interpreted before before this court? A. Yes, sir.

Mr. Davis: I have no further questions.

(Witness excused.)

The Court: I will make the customary order that

all witnesses remain out of the court room except the witness on the stand.

Mr. Kidder: I will call Mrs. Better Fong first.

LEONG LAN GIN

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified, through the interpreter, as follows:

The Clerk: State your name, please.

The Witness: Leong Lan Gin.

The Court: Now, Mr. Kidder, I set aside the judgment, and the only thing I am interested in is what this witness knows about the plaintiff, where the plaintiff was born, who the parents are.

Mr. Kidder: That would cut down the time we would utilize, except I feel the background of the witness is essential so we [95] can show where she gained her knowledge.

The Court: Yes, I want to know that. You may proceed.

Direct Examination

Q. (By Mr. Kidder): Where do you reside?

A. You mean now? 9851½ Yale Street, Los Angeles.

Q. Do you have any business or occupation?

A. My husband works. I am not in business.

Q. Of what country are you a citizen?

A. Wife of American citizen.

Q. Are you a citizen of the United States?

A. Not naturalized yet.

Q. Are you a citizen of China? A. Yes.

Q. Where were you born?

(Testimony of Leong Lan Gin.)

A. Chung Shan, Canton, China, Kin Mo Village.

Mr. Davis: Would you spell that, please?

The Interpreter: Kin, K-i-n, Mo, M-o, Village.

Q. (By Mr. Kidder): That is two words?

A. Yes.

Q. When were you born?

A. Chinese Republic, my date is CR 19, and I think American may be 1930 birthday.

Q. What is the full date of your birth?

A. Seventh month, nineteenth day. [96]

The Court: Will you translate that?

The Interpreter: September 11, 1930.

Q. (By Mr. Kidder): What are the names of your parents?

A. Phonetically, my father was Ling Ting Chong, and my mama's name was Chew Fung Shew.

Q. Are your parents living?

A. Mother is living. Father deceased.

Q. Where does your mother live?

A. Mother is still in Kin Mo Village.

Q. How long did you live in Kin Mo Village?

A. From the time of my birth until I was about 18 years old.

Q. In whose home did you live in Kin Mo Village?
A. With my father.

Q. When did your father die?

A. Second year after the Communists came. I approximate it to be five or six years ago.

Q. Did your father live in the same house with you and your mother?
A. Yes.

Q. Did you live in any other house or residence

(Testimony of Leong Lan Gin.)

in Kin Mo Village except the house where your parents lived? A. No.

Q. Where is this house located in which you lived? Strike that. [97]

How many main gates are there to the Kin Mo Village? A. Four; north, east, south, west.

Q. Are they all of the same size?

A. I cannot tell you the exact size, whether they are exactly the same, but they are roughly gates built on each of the four sides of the village.

Q. Where is your home in Kin Mo Village with reference to the direction, that is, north, east, south or west? A. Located near the east side.

Q. Are the houses in the village laid out in rows? A. Yes.

Q. Can you tell me in which row your house was located from the east side of the village.

A. From the east counting would be the third row, the last house.

Q. The last house in the third row?

A. That's right.

Q. Do you know a person by the name of Yip Mie Jork? A. Yes.

Q. Are you related to him?

A. Not related by blood, but I know of him because we went to school together, live in the same row, went to the same school. On special occasions we exchanged visits or met with one another.

Q. Did you say that your house was in the same row of [98] houses in which Yip Mie Jork lived?

A. Yes.

(Testimony of Leong Lan Gin.)

Q. Can you state the number of his house in the third row?

A. There were six houses in the same row of that row. Ours was the last house. His was the first house.

Q. When did you first meet Yip Mie Jork?

A. When we were children at the age of about six years old, we played together in the same street or alley.

The Court: Do you remember when you were six years of age?

The Witness: Well, maybe I don't remember all the other things, activities, but we were playmates from that time on in the same street or alley.

The Court: How old was Yip Mie Jork? Was he your age?

The Witness: A few years older than I.

The Court: How few? Six, seven, eight, one, two?

The Witness: About five years or so.

The Court: Older?

The Witness: Yes.

The Court: When you were six, then he was about 11, is that right?

The Witness: Yes.

Q. (By Mr. Kidder): Did Yip Mie Jork have any other brothers and sisters? [99]

A. I don't recall him having any sisters, but there is a younger brother.

Q. What is the name of the younger brother?

A. Share Wong, Yip Share Wong.

(Testimony of Leong Lan Gin.)

The Court: How much younger was he than Yip Mie Jork?

The Witness: I think about two or three years.

The Court: Did you play with his younger brother, too?

The Witness: Yes.

Q. (By Mr. Kidder): Was Yip Share Wong older or younger than you were?

A. I surmise one or two years older.

Q. Than you are? A. Than I was.

Q. Were you ever in the house of Yip Mie Jork? A. Yes.

Q. On what occasions or under what circumstances?

A. During New Year's Time, during birthdays, and during festivities in the village. In our village we have a custom of bringing things to our neighbors on festive days or occasions.

Q. Was Yip Mie Jork ever in your home?

A. Yes.

Q. On the occasions when you visited in the home of Yip Mie Jork, did you go alone?

A. I usually go with my younger sister.

Q. Did you ever go with anyone else? [100]

A. On a special occasion when we are invited to their home for dinner, our whole family would go, also, that is in visiting the house.

Q. Did Yip Mie Jork come to your home more than once?

A. Often, whenever there is special occasion, we

(Testimony of Leong Lan Gin.)

invite them to come over to our home for dinner, and on special occasions.

Q. Did you attend school in Kin Mo Village?

A. Yes, I started around 10 years old.

Q. What is the name of the school?

A. The name is Nom Fung School.

Q. Did Yip Mie Jork attend school?

A. Yes, in the same Nom Fung School.

Q. Was he in the same grade?

A. He is in a higher grade. He was in a higher grade.

Q. Did Yip Share Wong attend school?

A. Yes. He was about one grade higher than me.

Q. Did you ever see Yip Mie Jork in school?

A. After classes, yes, we saw each other, and also at the ball field or recreation field.

Q. Would that be at the school grounds?

A. At the school entrance.

Q. During this period when you state that you were playing on the streets with Yip Mie Jork, how often would you see him? [101]

A. You know, boys play more than girls in the village, and maybe he has gone out more often than we do, but whenever I go out, we see each other, but the boys play outside more than the girls.

Q. About how often would that be you would see him?

A. Whenever we are not in school, like Sunday, we would play outside the street there, but on school days we would see each other in the recreation field.

(Testimony of Leong Lan Gin.)

The Court: How many brothers did Yip Mie Jork have?

The Witness: According to what I hear——

The Court: Not what you hear. How many did you see? How many did you know of?

The Witness: When I was in China, Share Wong, Yip Mie Jork, was the ones I saw.

The Court: How many did you play with in China?

The Witness: I play with more than just the two Yip boys.

The Court: How many brothers did you play with, these brothers?

The Witness: And with the mother, too.

The Court: How many? Did you play with all these boys or just two of them?

The Witness: Those are the two.

The Court: Just two?

The Witness: Yes.

The Court: You were in the home, weren't you?

The Witness: There is the mother, too.

The Court: You went into Yip Mie Jork's home, didn't you?

The Witness: Yes.

The Court: Who was living in that home?

The Witness: As far as I know, there are two brothers and the mother.

The Court: Then the other brothers weren't living in the home, is that right?

The Witness: No.

(Testimony of Leong Lan Gin.)

The Court: Who were the brothers living in the home, what were their names?

The Witness: Mie Jork, Yip Share Wong.

The Court: Mie Jork and Yip Share Wong. Were the other two brothers younger or older?

The Witness: The older one is in the United States. The other one, it was rumored that he went to service, some kind of service. I don't know him.

The Court: How old were you when you left the village?

The Witness: 18.

The Court: When you left the village, where was Yip Mie Jork?

The Witness: They were in the village.

The Court: Where was Share Wong?

The Witness: With the older brother in the village.

The Court: All right. You can proceed. [103]

Q. (By Mr. Kidder): What is the name of the brother that you stated you met in the United States? A. Yip Share Leung.

The Court: Where is that brother now?

The Witness: He lives in Hollywood. He is inside there.

Mr. Kidder: He gave testimony, your Honor, in the original trial and is present in the witness room now.

Q. (By Mr. Kidder): Do you know the names of the parents of Yip Mie Jork?

Mr. Davis: I object to the question, your Honor. I believe that is calling for hearsay.

(Testimony of Leong Lan Gin.)

The Court: I think so. This witness wouldn't know. You know, if this was a trial here in the United States and we had a youngster six years of age come in and testify, I wouldn't let her testify until she was qualified, and yet we let these Chinese people testify. I don't think they remember.

Mr. Kidder: She testified only she remembered him first when she was about six years of age, but she does state she lived in the village until 1948. That would make her 18. She was playing with him and going to school with him.

The Court: Now, you go ahead and let's see what she knows.

Q. (By Mr. Kidder): Do you know the name of the mother of Yip Mie Jork?

Mr. Davis: I object to the question, also, as calling for hearsay. [104]

The Court: Objection sustained.

Mr. Kidder: May I be heard on that? I think it might be admitted on perhaps two bases. One, pedigree, possibly, or family history.

The Court: She can testify with whom the boy lived. You don't have any testimony as to the birth at all. All you are going to have to rely upon is reputation.

Mr. Kidder: That's right. That would be the second basis, perhaps, neighborhood reputation.

The Court: That's all this girl knows. You ask her who the mother is and she can't testify. She can testify whom the boy lived with.

(Testimony of Leong Lan Gin.)

Mr. Kidder: I believe she can testify, also, to any conversations she may have had.

The Court: You didn't ask her that.

Q. (By Mr. Kidder): You testified you have been in the home of Yip Mie Jork, is that correct?

A. Yes.

Q. Who lived in the home with Yip Mie Jork?

A. With his mother.

Mr. Davis: I object to that and move the answer be stricken.

The Court: It may go out. What was the name of the woman who was in the home?

The Witness: Wong She. [105]

Q. (By Mr. Kidder): Did you have any conversation with Wong She regarding the family history of the Yip family?

A. I never ask very many questions, but all I know the two boys call this Wong She mama.

Mr. Davis: I object to that as being unresponsive to the question asked. I wonder if we might ask the witness, through the interpreter, to try to contain her answers to the questions.

The Court: If you have a motion to strike, it is denied. It is up to the court to evaluate the testimony of this witness.

Q. (By Mr. Kidder): Were you ever present when there was any discussion concerning the family history of Yip Mie Jork?

A. In the village a young lady doesn't go into the family affairs of another family, but in the midst of my visiting with these people, I only feel

(Testimony of Leong Lan Gin.)

that these two boys were the sons of this lady, Mrs. Wong, but usually our conversation dwelt on school accomplishments, you know, about school, what do we do in school, and so on and so forth.

The Court: May I ask the witness a question? Do you know the difference between a full brother and a half brother?

The Witness: As far as I know, they both call this woman mama.

The Court: Do you know what a half brother is?

The Witness: I don't notice it.

The Court: You don't know what a half brother means? [106]

The Witness: I understand what you mean, but I don't feel they are half brothers.

The Court: Do you know what a half brother is?

The Witness: Yes, I understand.

The Court: What is a half brother?

The Witness: Sometimes with one parent the same, the other one is not the same.

The Court: How many children were in this home?

The Witness: The two brothers and mother.

The Court: You never saw any children in the home except these two brothers?

The Witness: No.

The Court: All you know is the two brothers called the woman mama, is that right?

The Witness: Mama, yes.

Q. (By Mr. Kidder): Do you know the reputation in the community or the neighborhood as to

(Testimony of Leong Lan Gin.)

the relationship between this lady and the two boys?

A. Everybody knows they belong to her, they eat together, they live together.

Mr. Davis: Your Honor, I don't mean to slow down the progress of the trial, but I think I will move to strike the answer. The witness——

The Court: It may go out.

Mr. Davis: Thank you. [107]

The Court: That may be marked Plaintiff's Exhibit 6 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit No. 6 for identification.)

Q. (By Mr. Kidder): I now show you a photograph marked Plaintiff's Exhibit 6 for identification and ask you if you can name the person depicted in that photograph.

A. This is Wong She.

Q. Is this the lady you have been talking about by the name of Wong She? A. Yes.

Q. I now show you Plaintiff's Exhibit 5 in evidence, being a photograph, and ask you if you can name the persons depicted in that photograph.

A. The center is Share Leung, the right, facing the picture, is Mie Jork, the left side, Yip Share Wong.

Q. I now show you a group of photographs attached to Plaintiff's Exhibit 1 in evidence and ask you if you can identify the person in the photograph on the upper left-hand corner.

A. Yip Share Wong, Share Leung, the middle one, Yip Mie Jork on the right.

(Testimony of Leong Lan Gin.)

Q. I show you a photograph in the upper right-hand corner of this group and ask you if you can identify the two persons there. [108]

A. Yip Share Leung on the right, Yip Mie Jork on the left.

Q. I show you a photograph in the lower left-hand corner of this group, and can you identify this person?

A. Yip Dock, the father.

Q. Have you ever seen this photograph before?

A. There was a large picture in their home, a larger one, that looks like him.

Q. In whose home?

A. Yip Mie Jork's home.

Q. I now show you a photograph on the lower right-hand corner of this group. Who is this person, if you know?

A. Yip Share Wong.

Mr. Kidder: Your Honor, when we had the prior trial, there was used a map of the National Geographic Society. Since that time I have been able to obtain a more detailed map of this vicinity. It is a Chinese map. With the court's permission, I would like to ask the interpreter to designate a few principal places here so that the general locality could be seen.

The Court: Let me see it. I can read Chinese. There are so many characters on this map, you can't see the map for the characters.

Mr. Kidder: I brought a magnifying glass for that purpose.

The Court: You can't change the testimony of

(Testimony of Leong Lan Gin.)

the witnesses [109] we already have had as to the location of the village.

Mr. Kidder: No, but I believe by locating the village on the map there, I can show it is consistent with all prior testimony.

The Court: I don't know how you can. The witnesses were in different directions. They located the village in absolutely opposite directions.

Mr. Kidder: I think if we pinpoint the village here as to where it is, it will be clear.

The Court: All right. Let the interpreter mark Hong Kong there. I think I know where Hong Kong is.

Mr. Davis: I wonder if we might examine the map for a moment.

The Court: Yes, you can examine the map.

Mr. Kidder: I would invite comparison with the National Geographic map as to the general contour of the vicinity.

The Court: Let the interpreter mark Hong Kong, Macao, Canton.

Mr. Kidder: Draw a line and number it so that people who examine the map later might have the benefit.

The Court: I don't think there is any confusion as to where Hong Kong is or Macao or Canton. I can mark them on the map from the general appearance. Just put a circle around Canton.

Mr. Davis: Your Honor, might we take a recess and I can [110] contact Mr. Dooley and he can come in and handle the trial from here. It appears

(Testimony of Leong Lan Gin.)

there is some conflict in the testimony as to the location of the village and I am not familiar with that.

The Court: I am familiar with that. You don't need Mr. Dooley here. They are not trying to convince Mr. Dooley. They are trying to convince me.

Mr. Kidder: Could I suggest the general location?

The Court: Is that a different dialect on the map?

The Interpreter: No. The words are so blurred I can't spot the label. I know the approximate location is here. Macao is above Hong Kong and Hong Kong is almost opposite Canton.

The Court: Macao is across the bay from Hong Kong and Canton is up the bay.

You know, if this witness has that much trouble locating Hong Kong and Macao, I don't know how she is going to locate a village on the map.

Mr. Kidder: If they get in the general vicinity, I am sure they can.

The Court: Is the village named on the map?

Mr. Kidder: Yes. That is what I am told.

The Witness: This is Macao.

Mr. Kidder: Now, can she find the village, Kin Mo Village?

The Court: Did she locate Canton? [111]

I know more about that bay than I do San Francisco.

The Interpreter: You want the city of Canton?

The Court: Yes. Go up to the head of the estu-

(Testimony of Leong Lan Gin.)

ary. You will find it. Maybe the witness can't read the Chinese.

The Interpreter: It is because it is so small, so many words on top of each other.

She says, do you have a larger map?

Mr. Kidder: That is the only one we have.

Would it be all right for the interpreter to designate where these cities are?

The Court: I told you I knew where Hong Kong, Macao and Canton are on that map.

Mr. Kidder: I do, too.

The Court: I can't read the Chinese names, but I know from that map where the cities ought to be located. Let's ask this witness a question and just forget the map a minute.

When you lived in the village, how far did you live from Macao?

The Witness: From the village we walked to a village called Dow Mon and from there we took a boat to Macao.

The Court: How long did it take you to go?

The Witness: About 10 hours.

The Court: Do you know the direction you went?

The Witness: From the village we go north to take the boat and after that I don't know which direction the boat takes us. [112]

The Court: How long does it take you to go from the village to Canton?

The Witness: From the village we go to Macao and then we go to Canton.

(Testimony of Leong Lan Gin.)

The Court: You have to go to Macao before you go to Canton?

The Witness: Yes.

The Court: Is the village located on the sea coast?

The Witness: Not too near, because we have to walk to the wharf and take the little boat.

The Court: Is the wharf on the ocean?

The Witness: The pier is a very small one where only small boats are launched there, and from there you go to Macao and then you transfer to a larger boat.

The Court: You know what the ocean is, don't you?

The Witness: You mean the Pacific Ocean?

The Court: Or the China Sea. I don't care what you call it.

The Witness: When you don't get up to senior high school, they don't teach you too much about geography in my village.

The Court: How can she locate this village? She has no idea.

Q. (By Mr. Kidder): If you take a boat from Macao to the village, do you get off the boat at any time before—strike that. [113]

If you take a boat from Macao to the place you named Dow Mon, do you get off the boat at any time between Macao and Dow Mon?

A. You take a small boat from Macao to Dow Mon and then you get off the boat and you walk about an hour.

(Testimony of Leong Lan Gin.)

Q. Then where do you arrive after you have walked an hour? A. Back to Kin Mo.

Q. Then the boat takes you to within an hour's walk of Kin Mo, is that right?

A. From Macao you ride the boat about 10 hours to Dow Mon, and at Dow Mon you get off the boat and you walk about an hour back to the village.

Q. Do you know whether the boat sails entirely on an ocean or on a river or in a bay? Do you know where the boat sails?

A. Where Macao is is where the big bay is, but when you get into the estuary, the village, it is small rivers.

The Court: Mr. Kidder, I think we are wasting time trying to get this location.

Mr. Kidder: With this witness, perhaps.

The Court: I am going to have to take an early recess. I am going to recess until 1 o'clock. That will give Mr. Dooley time to get here. I will give you two hours this afternoon. [114] You have had an hour this morning, so that will give you two hours this afternoon in addition.

Mr. Kidder: Your Honor, I believe this map is very vital for this reason. It does show the estuary and I am told it does show the village on here. Would there be any objection to the interpreter locating the principal cities?

The Court: I have no objection.

Mr. Kidder: This is only a matter of geography as to where these places may be.

The Court: You can let the interpreter look at

the map during recess and maybe the interpreter can locate these places on the map. I don't know. I can locate Hong Kong, Macao and Canton on that map without any trouble.

Mr. Kidder: I believe I can, too.

The Court: But I don't know where the village is.

Mr. Kidder: Two places mentioned, Dow Mon, and also Kin Mo Village, are marked on the map. It is only a question of locating them.

The Court: We will take a recess until 1:00 o'clock. You can tell Mr. Dooley what has happened. He can get here at 1:00 o'clock. I want you to plan to finish up with these witnesses by 3:00. I don't want any witness to testify who has already testified. I am not opening this case for the purpose of taking additional testimony from these other witnesses, but just the new witnesses is all I want. [115]

Mr. Kidder: I do not intend to recall anybody.

The Court: Court will stand in recess until 1:00 o'clock.

(A recess was taken to 1:00 o'clock, p.m.)

July 18, 1955; 1:00 o'clock, p.m.

LEONG LAN GIN

a witness called on behalf of the plaintiff, having been first previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Kidder): Mrs. Fong, I now have

(Testimony of Leong Lan Gin.)

an enlargement of the section of the Chinese map that was shown to you this morning. Will you now look at this enlargement? I would call your attention to this place marked 2, that is the city of Macao, as the interpreter has so designated on the map, and this portion up here designated as 3 is Canton City.

Are you able to state where your village is, Kin Mo Village is located? A. Kin Mo.

The Court: How do you know that is Kin Mo? Can you read it on the map?

The Witness: Yes. I read it here.

The Court: That is the way you know it, because you read it?

The Witness: In relation to Macao I am not able to go and tell you the direction north, south, east or west, but I can go by association. [117]

The Court: All right.

Q. (By Mr. Kidder): Do these letters mean anything here? Can you read these letters?

A. Kin Mo.

Q. Is that what they say? A. Yes.

Q. Pointing to the letters immediately above these Chinese characters, what do they say?

A. That is Mon.

Q. Is that a city?

A. That is one word missing. It is Dow Mon, see. It should be Dow Mon here.

Q. Were you ever in Dow Mon?

A. When I took the boat and went into the pier.

Q. Does the boat land at Dow Mon?

(Testimony of Leong Lan Gin.)

A. Not Dow Mon. There is a wharf where the boats tie in.

Q. How do you get from Dow Mon to Kin Mo Village?
A. By walking.

The Court: Let me see the map.

Mr. Kidder: May the interpreter encircle Dow Mon there and mark it with a number?

Q. Do you know how to travel by boat between Macao and Dow Mon?

A. By boat we pass a big ocean, a big body of water, [118] and also some river water and places where people have fishing, you see people doing fishing.

Q. Do you know the route the boat takes?

The Court: She wouldn't know. She didn't have any idea of directions.

Mr. Kidder: I just want to ask her yes or no. What was the answer?

The Witness: The direction, no.

Mr. Kidder: I have nothing further of this witness.

The Court: You can call the next witness.

(Witness withdrawn.)

Mr. Kidder: Russell Chan. His English isn't the best, but I believe he has enough command so we can proceed.

RUSSELL CHAN

a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: Will you please state your name?

The Witness: Russell Chan.

(Testimony of Russell Chan.)

Direct Examination

Q. (By Mr. Kidder): Russell, will you please be certain to speak loudly so the court and counsel and myself can hear you? A. Yes.

Q. Where do you live? [119]

A. 2181 Cooley Avenue, Palo Alto.

Q. What is your business or occupation?

A. Farmer.

Q. Of what country are you a citizen?

A. United States.

Q. How did you become a citizen of the United States? A. I was born in San Diego.

Q. What state? A. California.

Q. What is the date of your birth?

A. May 8, 1924.

Q. That is the American date? A. Yes.

Q. What are the names of your parents?

A. My father's name is Chan Lock.

Q. What is the name of your mother?

A. Wong Shee.

Q. Are your parents living?

A. My father passed two years ago and my mother is still living.

Q. Where does your mother live?

A. In China, in Kwang Tun.

Q. Where in China?

A. Chung Shan District, New Nam Shan.

Q. That is New Nam Shan? [120]

A. Yes.

Q. Is there an old Nam Shan?

A. Yes. That is the new village. It is smaller.

(Testimony of Russell Chan.)

Q. Are they located near each other?

A. Yes.

Q. Do these adjoin each other?

A. Oh, about three-quarters miles apart.

Q. Have you ever made any trips to China?

A. Yes.

Q. How many have you made? A. Two.

Q. When did you make your first trip?

A. 1927, the first trip.

Q. Where did you go on that trip?

A. Go to New Nam Shan Village.

Q. Were you accompanied by anyone on that trip?

A. Yes, by my mother and my two brothers and my sister.

Q. When did you return to the United States?

A. In 1938.

Q. Where did you live between 1927 and 1938?

A. In Nam Shan.

Q. Is that New Nam Shan? A. Yes.

Q. With whom did you live?

A. With my mother and my brothers and sister.

Q. When did you make your second trip to China? A. 1947.

Q. Where did you go on that trip?

A. To New Nam Shan Village, to my mother's place.

Q. And when did you return to the United States? A. In 1950.

Q. Where did you live in China between 1947 and 1950? A. In New Nam Shan Village.

(Testimony of Russell Chan.)

Q. Did you ever hear of Kin Mo Village?

A. Yes.

Q. Where is that located with reference to New Nam Shan Village?

A. That is east of Nam Shan about one hour's walking.

Q. That is Kin Mo is east? A. Yes.

Q. Of Nam Shan? A. Yes.

Q. One hour walking. About how far would that be in distance, if you can estimate it?

The Court: You can walk about four miles an hour. I don't know whether they walk fast or slow.

The Witness: Two and a half American miles. Of course, it is pretty hot to walk, not like here.

Q. (By Mr. Kidder): How did you get between your village and Kin Mo Village? [122]

A. By walking.

Q. Was there any other means of transportation? A. Well, they got bicycles.

Q. Do you know a person by the name of Yip Mie Jork? A. Yes.

Q. Is he related to you?

A. No. Just friend.

Q. Have you ever seen Yip Mie Jork?

A. Yes.

Q. When is your earliest recollection, that is, approximately what age were you when you have the earliest recollection of meeting Yip Mie Jork?

A. Oh, about seven or eight years old. My mother take us to visit his house earlier, but I don't remember. I am too small then.

(Testimony of Russell Chan.)

Q. Do you have any recollection of seeing him when you were seven or eight years old?

A. Yes.

Q. Where did you see him?

A. At his house. Sometimes his mother bring him and his brother to my house.

Q. Where did you see him, at your house or at his house? A. You mean the first time?

Q. The first time you have any recollection of seeing [123] him, yes. A. At his house.

Q. At his house? A. Yes.

Q. Where was his house?

A. At Kin Mo Village.

The Court: How old were you when you first saw him?

The Witness: About seven or eight years old.

The Court: How old was he?

The Witness: Oh, probably four or five, about four years old.

The Court: Then you were four years older than——

The Witness: Than Yip Mie Jork.

The Court: Than Yip Mie Jork?

The Witness: Yes.

The Court: Four years older?

The Witness: Yes.

Q. (By Mr. Kidder): Did you see him more than once? A. Yes, more than once.

Q. That is during the first time you lived in China between 1927 and 1938, did you see him more than once?

(Testimony of Russell Chan.)

A. Yes. I saw him three or four times every year until I come back in 1938. The last time I saw him between 1938—I mean the first time I went back was 1927, the last time I saw him. [124]

Q. You said you were in China between 1927 and 1938? A. Yes.

Q. Just confining yourself to that period, about how often did you see him?

A. Oh, about three times, four times every year.

Q. What were the occasions or what were the circumstances of these meetings? What was the reason for them?

A. Oh, just like New Year's, or something like that, and then we go visiting each other.

The Court: Let me go back and try to find out something. When did you go back to your village in 1927, what month was it?

The Witness: In 1927?

The Court: Yes.

The Witness: I don't know. I was too small.

The Court: How old were you then?

The Witness: Three years old.

The Court: Then you lived in the New Nam Shan Village from 1927 to 1938, that is eleven years?

The Witness: Almost eleven years.

The Court: You were about seven or eight years old when you first remember seeing Yip Mie Jork?

The Witness: Yes.

The Court: And Yip Mie Jork at that time was three or four years old? [125]

(Testimony of Russell Chan.)

The Witness: Yes.

The Court: When were you born?

The Witness: 1924.

The Court: What month?

The Witness: May 8th.

The Court: 1924?

The Witness: Yes.

Q. (By Mr. Kidder): Do you have any documentary evidence of your birth with you today, Russell? A. Yes.

The Court: This boy you saw when you were seven or eight years old, you say was Yip Mie Jork. How do you know that?

The Witness: Because I went to his house and his mother told me.

The Court: His mother told you this was Yip Mie Jork?

The Witness: Yes, and then I play with him.

The Court: You played with him?

The Witness: Yes.

Mr. Kidder: I have evidence of the birth. Mr. Dooley, will you stipulate this witness presented a certificate of birth in a certain name? I don't wish to offer it because it belongs to him and he should keep it.

The Court: That is all right. There has been no question raised whether or not this witness is telling the [126] truth when he says he was born May 8, 1924. I will take his statement as to when he was born.

Q. (By Mr. Kidder): Mr. Chan, where was the

(Testimony of Russell Chan.)

Yip home located in this Kin Mo Village, if you know?

A. East side of the village, third row from the gate, the first house near the street.

The Court: How big was this Kin Mo Village?

The Witness: I don't know exactly, but about 600 houses.

The Court: 600 houses?

The Witness: Yes.

Q. (By Mr. Kidder): How many main gates were there to this village, if you know?

A. Two big ones and two little small ones.

The Court: Was there a wall around this village?

The Witness: No.

The Court: What do you mean by gate?

The Witness: You just have a gate and everybody go in and come out this gate.

The Court: No wall?

The Witness: No wall.

Q. (By Mr. Kidder): Is this gate just an archway? A. Yes.

Q. You understand what I mean by an arch?

A. Yes. They build something with brick and everybody [127] go in and come out from the gate.

Q. With reference to the Yip home, you say it was located near the east gate, is that right?

A. Yes.

Q. When you walked from your own village to the Kin Mo Village, which gate would you enter into the Kin Mo Village?

(Testimony of Russell Chan.)

A. The west side, the west gate.

Q. That would be the west gate? A. Yes.

Q. How would you get from there to the Yip home?

A. I go in the west gate and then I walk over the street and then to the east to his home.

Q. Between this period of 1927 and 1938, who lived in the Yip home in Kin Mo Village, who lived there? A. His mother and two brothers.

Q. Do you know the name of the mother?

A. The name of the mother, Wong She.

Q. How many brothers besides Yip Mie Jork lived there? A. Two.

Q. What were their names?

A. The big one is Yip Jeang Shing and the smaller one is Share Wong.

The Court: Let's go back. Whose home is this?

Mr. Kidder: The Yip home. There was a mention made of this Jeang Shing by a prior witness, too. [128]

The Court: We had two children. How many children did you see in this home? Were they boys or girls?

The Witness: Boys.

The Court: How many boys were there?

The Witness: Altogether? Including Yip Mie Jork?

The Court: How many boys were there, including yourself?

Mr. Kidder: No. He is not a member.

(Testimony of Russell Chan.)

The Court: How many boys were there, including Yip Mie Jork?

The Witness: Three.

The Court: What were their names?

The Witness: Jeang Shing and Yip Mie Jork and Share Wong.

The Court: What was the first one?

The Witness: Jeang Shing.

The Court: How old was he?

The Witness: He is much older than I am.

The Court: How much?

The Witness: Maybe ten or eleven.

The Court: Ten or eleven years older than you?

The Witness: Yes.

The Court: How old were you then?

The Witness: When?

The Court: When you went over and saw these three boys in the house, how old were you?

The Witness: You mean the first time I remember? [129]

The Court: Yes.

The Witness: About seven or eight years old.

The Court: How old was Jeang Shing?

The Witness: Jeang Shing must be 19 or 18 or 20. He is much bigger than I am.

The Court: What is the other boy's name?

The Witness: Yip Mie Jork.

The Court: How old was he?

The Witness: He is three years younger than I am.

(Testimony of Russell Chan.)

The Court: How old was he when you went over there?

The Witness: Oh, four.

The Court: Who is the other boy?

The Witness: Share Wong.

The Court: How old was he?

The Witness: Three.

Q. (By Mr. Kidder): Are there any other brothers in this family or half brothers that you have not named? You have named three people thus far. Is there anyone else?

The Witness: In the house?

Q. No, not in the house, but in the family.

Mr. Dooley: I object, your Honor, on the ground he hasn't shown he knows everybody in the family.

Mr. Kidder: He mentioned three brothers.

The Court: Overruled.

Q. (By Mr. Kidder): Is there any other brother or half brother? [130]

A. Yes. They got Yip Mie Jork and Share Wong, who have the same mother, and they got two brothers, Jeang Shing and Share Leung, and the mother pass away, but not the same mother.

The Court: How do you know?

The Witness: Because my father is a friend of Yip Dock and Yip Share Leung know my father. The first time we went home to China we took the same boat with Share Leung in 1927 when we go home to China, go back to China.

Q. (By Mr. Kidder): Getting back to the period of 1927 to 1938, when you were there, which

(Testimony of Russell Chan.)

boys of the Yip family were living in this house at the time you first remember being there, your first recollection, which boys lived there then?

A. Jeang Shing and Yip Mie Jork, Share Wong.

Q. At the time you left about 1938, which boys, if any, were living there in the Yip house at that time?

A. At that time Yip Mie Jork and Share Wong.

Q. Where was Jeang Shing, if you know?

A. I don't know.

Q. Did Yip Mie Jork ever visit in your home?

A. Yes.

Q. That is in Nam Shan Village?

A. Yes.

Q. At the time he visited at your home, was he accompanied by anyone?

A. By his mother and his brother. [131]

Q. Did you ever stay overnight at any time in the Yip home?

A. Yes, in 1949, before I come back here.

Q. That would be on your second trip?

A. Yes.

Q. You testified that you went to China a second time in 1947 and remained there until 1950. Did you see Yip Mie Jork at any time during the course of that trip? A. Yes.

Q. Did you see him more than once?

A. Yes.

Q. About how many times did you see him?

A. Oh, about three or four times every year.

(Testimony of Russell Chan.)

Q. What were the occasions among which you saw him then?

A. Just a friendly visit.

Q. Who lived in the Yip home at that time?

A. Yip Mie Jork and his brother.

Q. Was there a lady living in the home at that time?

A. No.

Q. Did you ever see Yip Dock?

A. Well, I saw him once when I was a little boy, but I don't remember him. I only saw his picture hang on the wall.

Q. Where was the picture?

A. On the wall. [132]

Q. What wall?

A. The living room wall.

Q. In whose home?

A. In Yip Mie Jork's home.

Q. I now show you a group of photographs attached or made a part of Plaintiff's 1 in evidence, and I ask you if you can identify the person depicted in the photograph in the upper left-hand corner beginning on the left?

A. Share Wong.

Q. Who is the person in the middle?

A. Share Leung.

Q. Who is the person on the right?

A. Mie Jork.

Q. I show you the picture in the upper right-hand corner of the same group of photographs and ask you to identify the persons therein, beginning with the individual on the left.

(Testimony of Russell Chan.)

A. Mie Jork.

Q. And the individual on the right?

A. Share Leung.

Q. I now show you a photograph contained in this group which is in the lower left-hand corner and ask you if you can identify that person.

A. Yip Dock.

Q. Did you ever see this picture or a similar one at that time? [133]

A. Yes. I saw the bigger one.

Q. Where did you see this picture?

A. In Mie Jork's house.

Q. Is this the picture you refer to as being on the wall of the house?

A. Yes, but not this size, a big size.

Q. About how large?

A. Oh, about this size.

Mr. Kidder: Can we take his measurement at about 10 square inches, more or less?

The Witness: About 10-15.

Q. (By Mr. Kidder): I now show you a photograph in this group at the lower right-hand corner. Can you identify that person?

A. It is Share Leung.

Q. Did you ever see any of these particular photographs before today? Did you ever see any of these photographs before?

A. Exactly the same, this size?

Q. These particular photographs, have you ever seen them before? A. No.

Q. I now show you a photograph marked Plaintiff's Exhibit 5 in evidence, and ask you if you can

(Testimony of Russell Chan.)

Identify the persons therein beginning with the individual on the left?

A. Share Leung and Share Wong and Yip Mie Jork. [134]

Q. I now show you a photograph which is marked Plaintiff's Exhibit 6 for identification and ask you if you can identify the person in that photograph?

A. Wong She, Yip Mie Jork's mother.

Q. When you made your trip to China in 1947, what was the first port you arrived at when you arrived in the Orient?

A. Hong Kong.

Q. How did you travel from Hong Kong to your village?

A. From Hong Kong to Macao and from Macao to Dow Moon.

Q. Would you spell that, please?

A. D-o-w, M-o-o-n, and then I went to the village.

Q. How did you travel between Macao and Dow Moon?

A. By boat.

Q. Approximately how long?

A. Five hours, sometimes it is four and a half, sometimes five.

Q. What does it depend upon, if you know?

A. The wind and the tide.

Q. Some days you can travel faster than others. After you reach Macao, is it necessary to change boats?

A. Yes, change to smaller boat from Macao to Dow Moon.

(Testimony of Russell Chan.)

Q. How long does it take to travel from Macao to Dow Moon? A. How long?

Q. Yes. [135]

A. Oh, about nine or ten hours, sometimes eight hours, depending on the wind and the tide. Sometimes they get low tide and high wind and it is pretty slow, maybe take more than ten hours.

Q. It depends again upon the wind and the tide?

A. Yes.

Q. Where is Dow Moon located, in what district? A. Chung Shan.

Q. In what district is your village located?

A. Same district.

Q. How far is it approximately from Dow Moon to New Nam Shan Village?

A. Oh, about an hour, take about an hour and twenty minutes to walk.

Q. I show you a map in Chinese characters and ask you if you can locate thereon the Chung Shan District?

Mr. Dooley: Your Honor, I object to this on the first ground that the various districts are already marked on there with red pencil.

The Court: That is right, they are all marked. However, I suppose we ought to be able to look at the map. Objection overruled.

Q. (By Mr. Kidder): Can you find on this map the city of Hong Kong? You may use the magnifying glass, if you like.

A. Here is Hong Kong. [136]

(Testimony of Russell Chan.)

Mr. Kidder: Mr. Dooley, will you really acknowledge he has pointed to the same place?

Mr. Dooley: I will acknowledge a red line goes through Hong Kong and, I believe, also, the Chinese characters read Hong Kong. Is that correct?

Q. (By Mr. Kidder): Does this Chinese character here read Hong Kong? A. Yes.

Q. Can you find Macao on this map?

A. Yes, right here.

Q. Does the Chinese character say Macao?

A. Yes.

Q. Are you able to read it? A. Yes.

Q. Will you point out where the Chung Shan District is, wherever your brothers may be?

A. Chung Shan District is this all, but Dow Moon is here and then I live here. Nam Shan is here.

Q. You live on the east coast. Is this an island here? A. Yes.

Q. You live on the east coast? A. Yes.

Q. Of this island? A. Yes.

Q. Will you place a mark where your village is?

A. Yes (witness complying).

Q. What does this say here?

A. Dow Moon here.

Q. This is Dow Moon? A. Yes.

Q. This is the place where you get off the boat?

A. Get off the boat here.

Q. On this little tributary, I suppose it would be.

A. And then I walk 20 minutes to Dow Moon

(Testimony of Russell Chan.)

and from Dow Moon I take a little trip inside, near Dow Moon, but not too close.

Q. Is Dow Moon right on the map, the city itself, is it right on the map?

A. No. Oh, about 20 minutes, 15 minutes walk to the creek, and then the boat go in the creek here and then I walk to Dow Moon.

Q. Where you get off the boat, you still have to walk a ways to get to Dow Moon?

A. Yes.

Q. Then you walk further on to the village?

A. Yes.

Q. There is another Chinese character appears on this island here. Can you state what this is?

A. Kin Mo.

Q. Is it the Kin Mo Village you have been discussing [138] in your testimony today?

A. Yes.

The Court: You say that is on an island, Kin Mo?

The Witness: There is water all around it.

The Court: How big is this island? How big is this island?

The Witness: I never go all over the island. It is pretty hard to walk all over it. They got trees and everything.

The Court: How do you know it is an island then?

The Witness: Because I go by boat right here to here, and then all on this side they got all water. I go fishing here. I go fishing right here.

Q. (By Mr. Kidder): Can you take this pen

(Testimony of Russell Chan.)

and draw an approximate course that the boat would take from Macao to Dow Moon?

A. Macao here.

Q. That is Macao there?

A. Yes. They go this way and then go this way in here, in here to the creek, and then to Dow Moon.

Mr. Kidder: Now, could we use the other map a moment?

Q. This is an enlarged section of the Chinese map I have just shown to you. Can you pick out the Kin Mo Village and Dow Moon on this map?

A. Yes.

Mr. Dooley: Your Honor, I make the same objection. The [139] various places are encircled in red on the map.

The Court: The same ruling.

Q. (By Mr. Kidder): What is this where the red circle appears on the right, what is this place?

A. Macao.

Q. Can you trace on this map in ink the approximate course of the vessel as it travels between Macao and Dow Moon?

A. From Macao you go here.

Q. Will you place a mark on this map as to the approximate location of your village with reference to Kin Mo and Dow Moon?

(Witness complying.)

Q. When you get off the boat and proceed to Dow Moon, is it necessary to go through Kin Mo first before you reach your village?

(Testimony of Russell Chan.)

A. No.

Q. You can go directly from Dow Moon to your village, is that right? A. Yes.

The Court: When you *first* Yip Mie Jork how old did you say Yip Mie Jork was?

The Witness: Four years old.

The Court: You were seven years old?

The Witness: Yes.

The Court: All right.

Mr. Dooley: No further questions.

The Court: You may step down.

(Witness withdrawn.)

FAY JEAN CHEW

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified, through the interpreter, as follows:

The Clerk: Will you please state your name?

The Witness: Fay Jean Chew.

Direct Examination

Q. (By Mr. Kidder): Will you state your name, please? A. Fay Jean Chew.

Q. Where do you reside?

A. I live in Oakland.

Q. And what address?

A. 4735 Congress Street, Oakland.

Q. Are you married? A. Yes.

Q. Do you have any business or occupation?

A. Grocery store.

Q. What is your citizenship?

(Testimony of Fay Jean Chew.)

A. Wife of a citizen.

Q. Where were you born? A. China.

Q. What place?

A. In Nam Shan, New Nam Shan, Canton, China.

Q. What district is New Nam Shan located in?

A. Chung Shan.

Q. What is the date of your birth?

A. I was born in 1930, but Chinese, second month, thirteenth day.

The Interpreter: March 12th.

Mr. Kidder: 1930?

The Interpreter: Yes, 1930.

Q. (By Mr. Kidder): What are the names of your parents? A. Chan Deen.

Q. What is the name of your mother?

A. Fong Shee.

Q. Are your parents living?

A. Both deceased.

Q. Did you ever hear of Kin Mo Village?

A. Yes.

Q. Where is it located with reference to your own birthplace, New Nam Shan?

A. We are west of it.

The Court: How far?

The Witness: About walking distance, one hour.

The Court: Do you know how many lis?

The Witness: I do not know. [142]

Q. (By Mr. Kidder): How do you travel between your village and Kin Mo Village?

A. By walking.

(Testimony of Fay Jean Chew.)

Q. Which village is larger, Kin Mo or New Nam Shan? A. Kin Mo.

The Court: How large is Kin Mo Village?

The Witness: I guess it is about five to six hundred houses.

Q. (By Mr. Kidder): How large is New Nam Shan? A. About 200 houses.

Q. How long did you live in your birthplace, New Nam Shan?

A. 18 years. You know, the Chinese call it one year after you are born, so when I am 18—

Q. What year did you leave Nam Shan?

A. Chinese, 18 years old.

Q. You were 18 years old Chinese reckoning at the time you left New Nam Shan, is that right?

A. Yes.

Q. Do you know a person by the name of Yip Mie Jork? A. Yes.

Q. Are you related to him?

A. My grandma is the younger sister of Mie Jork's mother's father.

Q. Yip Mie Jork is a distant relative, would that be [143] right?

A. In China, we call relatives.

Q. Did you ever see Yip Mie Jork?

A. Yes.

Q. How old were you when you have your first recollection of having seen Yip Mie Jork?

A. From very young we know of each other's family.

(Testimony of Fay Jean Chew.)

The Court: But how old were you? Five, six, seven, eight, ten?

The Interpreter: She hasn't finished.

The Witness: But from my recollection, I think it was about eight years old, eight or nine years old.

The Court: How old was Yip Mie Jork then?

The Witness: He is bigger than I am.

The Court: Bigger?

The Witness: He is older, I think two or three years, about.

The Court: He was ten or eleven then?

Q. (By Mr. Kidder): Do you know the names of Yip Mie Jork's parents?

A. Yip Dock is the father, mother Wong She.

Q. Did you ever see Wong She?

A. Yes.

Q. Where did she live?

Q. Now she died already, but she used to live in Kin Mo. [144]

Q. Did you ever go to the Yip home in Kin Mo Village? A. Yes.

Q. In what section of the village was the home located, in what section of Kin Mo Village?

A. Near the east side.

Q. Were the houses in Kin Mo Village arranged in rows? A. Yes.

Q. Do you know in which row the Yip home was located from the east side of the village?

A. About the third row.

Q. During the time you lived in Nam Shan Vil-

(Testimony of Fay Jean Chew.)

lage from birth until approximately the age of 18, did you see Yip Mie Jork more than once?

A. Many times.

Q. About how often would you see him, say per year? A. About three times or so.

The Court: A year?

The Witness: Yes. Sometimes two times, sometimes three times a year.

Q. (By Mr. Kidder): What would be the occasions that you would see Yip Mie Jork?

A. Usually at vacation time, usually when they had a vacation.

Q. At the time you visited at the Yip home, did anyone ever accompany you? [145]

A. Sometimes with my own sister, sometimes with my grandmother.

Q. Did you ever stay overnight there at the Yip home? A. Yes.

Q. More than once? A. Many times.

Q. What was the longest period you stayed at the home?

A. One two weeks sometimes, sometimes three weeks.

Q. At the time you first knew Yip Mie Jork, how many people were living in the Yip home?

A. Three persons, as far as I recall, one mamma and two sons.

Q. What was the name of the mamma?

A. Wong She.

Q. What were the names of the sons?

A. Mie Jork and Share Wong.

(Testimony of Fay Jean Chew.)

Q. Did Yip Mie Jork ever visit at your home in New Nam Shan Village? A. Yes.

Q. More than once? A. Many times.

Q. About how often?

A. At least once or twice.

Q. Once or twice per what?

A. Per year. [146]

Q. Was he accompanied to your home by anyone on these occasions when he came?

A. Sometimes his mother Wong She and Share Wong, too.

Q. Did you ever discuss with Wong She the family relationship, matters of the family relationship? A. Yes.

Q. Was Wong She married? A. Yes.

Q. What was the name of her husband?

A. Yip Dock.

The Court: How does she know? You know, she can't testify to the marriage of these people. She wasn't present.

Mr. Kidder: I think she could testify, your Honor, still on the matter of pedigree.

The Court: She can't give her conclusions as to whether they were married or not. I am assuming they were married. All this witness knows is that she went back to the village home and she saw the plaintiff when the plaintiff was eight years old. That's all. She can testify that the plaintiff lived in the house, probably called a woman in the house mamma. That is all she can testify to.

Mr. Kidder: Let's assume that the family rela-

(Testimony of Fay Jean Chew.)

tionship has been discussed. She is a distant relative of this boy.

The Court: But just because you want to prove pedigree, you can't violate all the rules of hearsay, can you? [147]

Mr. Kidder: Pedigree is an exception to the hearsay rule, and where you have a declarant who may be dead or absent from the jurisdiction, any statement the declarant may have made to her as to the family relationship would be admissible.

The Court: You bring in the testimony of a witness who is not before this court. You don't give the Government any opportunity to cross examine the witness at all. I think the Government has some rights on cross examination.

Mr. Kidder: That may be true, but I think pedigree always goes to that circumstance, where you have family group who discuss family affairs.

The Court: She wasn't a member of the family. She was an outsider. She went over to visit two or three times a year.

Mr. Kidder: She did testify she was a relative.

The Court: What relative?

Mr. Kidder: A distant relative.

The Court: Can you tell me what relative she was?

Mr. Kidder: I can't follow that close, but in China they would be relatives because of the proximity.

Q. I now show you some photographs which are a part of Plaintiff's Exhibit 1 in evidence. I show

(Testimony of Fay Jean Chew.)

you the photograph in the upper left-hand corner and ask you if you can identify the persons therein beginning with the individual on the left? [148]

A. Share Wong?

Q. In the center? A. Share Leung.

Q. And the person on the left?

A. Mie Jork.

Q. I show you a photograph in the upper right-hand corner and ask you if you can identify the two people therein beginning with the person on the left? A. Mie Jork.

Q. And this person? A. Share Leung.

Q. I now show you a photograph on the lower right-hand corner of this group and ask you if you can identify this individual.

A. Yip Dock.

Q. Did you ever see this photograph before?

A. Yes.

Q. Where? A. A big one.

Q. Where?

A. At Mie Jork's home in the living room, hanging there.

Q. I now show you a photograph in the lower right-hand corner of this group and ask you if you can identify that individual? [149]

A. Share Wong.

Q. I now show you Plaintiff's Exhibit 5 in evidence, being a photograph, and I ask you if you can identify the three persons in that photograph, beginning with the person on the left?

A. The one on the right is Mie Jork. Share

(Testimony of Fay Jean Chew.)

Leung is in the middle. Share Wong is on the left.

Q. I now show you a photograph marked Plaintiff's Exhibit 6 for identification and ask you if you can identify that individual?

A. Wong She.

Q. Is this the same Wong She you have been discussing in the course of your testimony?

A. Yes.

Q. After you left the village in 1948, where did you go?

A. To get married.

Q. Where did you go?

A. Hong Kong.

Q. When did you come to the United States?

The Court: Before we get through that, you left the village when you were 18. How old was Yip Mie Jork at that time?

The Witness: I think either 20 or thereabouts.

Q. (By Mr. Kidder): When did you come to the United States? [150]

A. 1951.

Q. Did you ever return to your home village between 1948 and 1951.

A. Yes. I went back to the village.

Q. Did you go more than once to the village during that period?

A. Quite often. I don't remember how many times.

Q. Where was your home between 1948 and 1951?

A. You mean my own family after marriage?

Q. You were absent from the village or living

(Testimony of Fay Jean Chew.)

outside the village from 1948 to 1951. I want to know what village.

A. Either in Hong Kong or the village.

Q. When did you last see Yip Mie Jork?

A. 1949.

Q. Where?

A. At my own village, 1949.

Q. That is New Nam Shan Village?

A. Yes.

Q. Under what circumstances did you see him, there?

A. The occasion was when I went back after I was married. I used to go back to visit my parents when they were living. At that time when I went back to the village home, Mie Jork was visiting us, too, in the village home.

Q. Where was he living at that time, if you know? A. Kin Mo. [151]

Q. How did you travel from Hong Kong to New Nam Shan Village?

A. From Hong Kong we took the boat to Macao. From Macao to Dow Mon. From Dow Mon a little ways we walk home.

Q. How long did it take you to travel between Hong Kong and Macao by boat?

A. Four or five hours.

Q. How long did it take you to travel by boat from Macao to Dow Mon?

A. There is no set time, maybe eight or nine hours, because it depends upon the wind and the tide. They are small boats.

(Testimony of Fay Jean Chew.)

Q. Where did you get off the boat—strike that. How did you go from Dow Mon to your village? How did you travel? A. We walk.

Q. Does the boat dock at Dow Mon?

A. Yes.

Q. Is the city of Dow Mon right on the river or a tributary or water where the boat enters?

A. Not far away. There is a sort of place where the boat anchors.

Q. I now show you a map written in the Chinese language and ask you if you can locate on here first Hong Kong?

A. That is Hong Kong there. [152]

Q. Can you locate Macao? A. Here.

Q. Now, can you locate Dow Mon?

A. I can see the word Mon there. I can't find the word Dow.

Mr. Kidder: Mrs. Interpreter, did she point out the same location where the previous witness said the word Mon appeared only?

The Interpreter: Yes.

Q. (By Mr. Kidder): Can you find Kin Mo Village? A. Right below it.

Mr. Dooley: Your Honor, I object to this line of questioning for the simple reason the witness is merely reading the words from the map.

The Court: I understand that she is. I think it is for the court to evaluate the testimony. Objection overruled.

Q. (By Mr. Kidder): Is your village Nam Shan named on this map that you can locate?

(Testimony of Fay Jean Chew.)

A. I can't seem to see it. It is too small.

Mr. Kidder: Nothing further.

The Court: All right. You may step down.

(Witness excused.)

The Court: Call your next witness. [153]

CHIN SHEE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified, through the interpreter, as follows:

The Clerk: Will you state your name?

The Witness: Chin Shee.

Direct Examination

Q. (By Mr. Kidder): Where do you reside, Mr. Chin? A. San Francisco, Sunnyvale.

Q. In what state?

A. Sunnyvale, California.

Q. What is your business or occupation?

A. Farmer.

Q. Where were you born? A. China.

Q. Where?

A. Nam Shan, Chung Shan Canton, China.

The Court: What was the village?

The Witness: Nam Shan.

Q. (By Mr. Kidder): Is there more than one Nam Shan Village?

A. There is a new one, but I lived in the old one.

Q. What is the date of your birth?

(Testimony of Chin Shee.)

A. Born in the year 1900, Chinese date eleventh month, [154] fifth day.

The Interpreter: That would be December 26, 1900.

Q. (By Mr. Kidder): What country are you a citizen of? A. I am a citizen of China.

Q. When did you first come to the United States?

A. 1919. I left about the sixth month from Hong Kong that year.

Q. Have you ever made any trips to the Orient since you entered the United States in 1919?

A. Yes.

Q. How many trips have you made?

A. Two times—three times.

Q. When did you first depart for China?

A. 1935.

Q. When did you leave for the United States?

A. 1936 returned.

Q. Where did you go during the course of that visit? A. Nam Shan.

Q. Old Nam Shan? A. Yes.

Q. When did you depart on your second trip?

A. 1947 I left, and returned 1947.

Q. How long were you in China at that time?

A. About half a year.

The Court: About six months? [155]

The Witness: Yes.

Q. (By Mr. Kidder): Where did you go at the time? A. Nam Shan.

(Testimony of Chin Shee.)

Q. When did you take your third trip, when did you depart on your third trip?

A. 1949.

Q. When did you return?

A. About a year or so, twelve or thirteen months.

Q. Where did you go on that occasion?

A. At that time to Macao because the Communists had already come to China and I didn't dare go back to the village.

Q. Did you know a person by the name of Yip Dock? A. Yes.

Q. When did you first meet Yip Dock, when did you first see him? A. 1900.

Q. Where did you meet him at that time?

A. Stockton, California.

Q. Where you living at that time?

A. I was living at Stockton, too.

Q. Did you see Yip Dock more than once in Stockton, California? A. Many times.

Q. Over what period of time did you see him in Stockton? A. Many years. [156]

Q. Approximately how many?

A. At least seven or eight or nine years.

Q. Under what circumstances would you see him in Stockton?

A. He is a friend of my brother.

Q. Where would you see him?

A. My brother has a store, Chinese herb store, and at that store I met him.

Q. What was the name of the store?

Mr. Dooley: I object, your Honor.

(Testimony of Chin Shee.)

The Court: Overruled.

The Witness: Bok Chai Tong.

Q. (By Mr. Kidder): Were you ever employed at the store? A. Yes.

Q. Did you see Yip Dock on any occasions when you were employed at the store?

A. Yes.

Q. When did you last see Yip Dock?

A. It is so long ago, many, many years ago. It could be 1924, 1925, about that time.

Q. At the time you departed for China on your first trip, November 1935, did you take or carry any articles with you to China?

A. Yes.

Q. What did you take or carry with you? [157]

A. Because Mr. Yip Dock was a friend of my brother, after he died there were things left by him left with my brother for me to bring home to China to his folks.

Q. What was the nature of these articles?

A. I couldn't recall all the content of the things in the suitcase, but there was a wristwatch, fountain pen, and some clothing.

Q. Whose property was this?

A. Yip Dock's property.

Q. How did it come into your possession?

A. Because Mr. Yip Dock is a friend of my brother and my brother was in charge of his funeral service, so what was left behind by Mr. Yip Dock, my brother entrusted to somebody who is reliable to bring home to China for him.

(Testimony of Chin Shee.)

Q. What did you do with these articles?

A. My brother delegated me to bring them back to his family in China, meaning Dock's family in China.

Q. What did you do with them?

A. I gave it to his wife, the suitcase.

Q. At the time you delivered these articles to her, where was the wife living?

A. Kin Mo.

Q. Where is Kin Mo located?

A. It is about an hour's walk from my place.

Q. Did you deliver these articles personally?

A. Yes.

Q. What happened on this occasion when you delivered the articles?

A. Well, when I enter the household, Mrs. Yip said, "I have these two children here," and that is all.

Q. How long were you at the house, the Yip house?

A. I was in the house about five hours, four or five hours.

Q. Were there any other people in the house when you were there?

A. Just the three of them.

The Court: May I ask a question? You say that she said, the woman in the house said, "I have these two children." How old were the children?

The Witness: I think, according to my observation, about seven or eight years old.

(Testimony of Chin Shee.)

Q. (By Mr. Kidder): Do you know the names of the children?

A. Yip Mie Jork was one, Yip Share Wong the other.

Q. Did you ever see Yip Mie Jork at any other time? A. Yes, again in 1947.

Q. Where did you see him at that time?

A. At that time I had some friend who was studying at Kin Mo and he used to travel back and forth between Nam Shan and Kin Mo, so whenever he goes, he would like to ask me to go [159] along and this is the place, and I said fine, because I also have a friend who died and left behind two sons in the village, so I used to go and see these two boys in the village.

Q. What was the name of your friend?

A. My friend, my clansman was Chin Gung Wing.

Q. Did you visit at the Yip home in 1947? Did you see Yip Mie Jork at that time?

A. Yes.

Q. Did you have any photographs taken with Yip Mie Jork in 1947? A. Yes.

Q. Where?

A. Yes, on the occasion when we go visit the ancestral tombs in a place nearby, you call it the graveyard here or the grave mound.

Mr. Kidder: Will you mark this, please.

The Court: Plaintiff's Exhibit 7 for identification.

(Testimony of Chin Shee.)

(The exhibit referred to was marked Plaintiff's Exhibit No. 7 for identification.)

The Witness: That is the place where the ancestors are buried.

Q. (By Mr. Kidder): I now show you a photograph and ask you if you have ever seen this picture before? A. Yes.

Q. Are you in this picture? [160]

A. This one, the one in the foreground.

Q. Will you place a mark beneath the person you designate as yourself?

A. (Witness complying.)

Q. Is Yip Mie Jork in this photograph?

A. Yes.

Q. Will you place a mark under the person to designate as Yip Mie Jork? A. Yes.

Q. When was this photograph taken?

A. 1947.

Q. And where? A. Dai Sham Hung.

Q. What's that?

A. This is the place called Dai Sham Hung. It is the burial ground for our ancestors.

Q. This background in the picture, does that represent the burial ground?

A. This is not exactly the spot. They always have to have a distance, you know. This is the entire ground. These are the big rocks.

Q. Who took this photograph, if you know?

A. It is a part of the Spring ritual.

Q. What person took the photograph?

A. Chin Gung Wing. [161]

(Testimony of Chin Shee.)

Q. Is that the person you identified as your clansman? A. Yes.

Mr. Kidder: I now offer this photograph in evidence.

Mr. Dooley: No objection.

The Court: It may be received in evidence.

The Clerk: Exhibit 7.

(The exhibit heretofore marked Plaintiff's Exhibit 7 was received in evidence.)

Q. (By Mr. Kidder): When did you last see Yip Mie Jork? A. 1949.

Q. Where? A. Macao.

Q. Approximately what date?

A. The eighth or ninth month of the year, about that time. I am not sure the exact date.

Q. Is that the American eighth or ninth month?

A. That is the American date, Western date.

Q. In what place in Macao did you see him at that time? A. He came to my home.

The Court: In Macao?

The Witness: Yes.

Q. (By Mr. Kidder): Where were you living in Macao?

A. Number 2 Fong on Sun Street, Macao.

Q. Did anyone come with Yip Mie Jork?

A. The big brother. [162]

Q. What is his name?

A. Share Leung Yip.

Q. Did anyone else come with Yip Mie Jork?

A. Share Wong was there.

Q. How many times did you see them in Macao?

(Testimony of Chin Shee.)

A. He visited me twice and I returned the call to his hotel and to come for tea.

Q. I now show you photos attached to Plaintiff's Exhibit 1, being a group of four photos, and ask you if you can identify the persons depicted in the upper right-hand corner of the photograph, beginning with the person on the left.

A. Share Wong.

Q. The middle? A. Share Leung.

Q. And on the right? A. Mie Jork.

Q. I show you a photograph on the upper-right-hand corner and ask you if you can name the persons depicted therein, beginning with the individual on the left. A. Mie Jork is on the left.

Q. This one?

A. The right is Share Leung.

Q. I show you a photograph in the lower left-hand corner of this group and ask you if you can identify this individual? A. Yip Dock. [163]

Q. Is this the person referred to as Yip Dock that you testified you knew in Stockton?

A. Yes.

Q. I now show you a photograph in the lower right-hand corner of this group and ask you if you can identify this individual?

A. Share Wong.

Q. I now show you Plaintiff's Exhibit No. 5 in evidence and ask you if you can identify the three persons in that photograph beginning with the person on the left?

(Testimony of Chin Shee.)

A. Share Wong left, Share Leung center, Mie Jork on the right.

Q. Did you ever travel from Hong Kong to your home village in China? A. Yes.

Q. How do you travel from Hong Kong to your home village? A. By boat.

Q. How long does it take you to travel from Hong Kong to Macao by boat?

A. Over four hours.

Q. How long does it take you to travel from Macao to your home village?

A. You know how the Chinese small river sometimes is drier and sometimes it is high tide, so approximately eight to [164] seven hours or more, depending on the tide.

Q. Where did you get off the boat just before you reach your home village?

A. Dow Mon.

Q. How far is it from Dow Mon to your village?

A. A little over an hour, perhaps, walking.

Q. Is there any means of transportation other than walking between Dow Mon and your village?

A. Formerly it is usually by walking, but in recent years I know that they have bicycle transportation.

Q. I show you a map with Chinese characters and ask you if you can locate on here the city of Macao.

The Court: Mr. Kidder, there is no dispute as to the location of Hong Kong, Macao and Canton. We have already got testimony in as to the location

of the village. The map shows where the village is. I am satisfied that these witnesses are only reading from the map. They are reading the name.

Mr. Kidder: I will dispense with that then. It may not be necessary. I just want to show the familiarity of the witness with the territory.

I have no further questions of this witness.

The Court: I am going to have to continue this matter. I was hoping we could dispose of it this afternoon, but I have a judges' meeting that I have to attend. I am going to be down in San Diego next Monday. What have we got for next [165] Monday?

(Discussion between court and clerk.)

The Court: We will continue this matter to 2:00 o'clock next Tuesday, a week from tomorrow, 2:00 o'clock.

Mr. Kidder: Before we close I would like to offer Plaintiff's Exhibit 6 for identification in evidence, which has been identified as Wong She by two people.

Mr. Dooley: No objection.

The Court: It may be received in evidence.

The Clerk: Exhibit 6.

(The exhibit heretofore marked Plaintiff's Exhibit 6 was received in evidence.)

(Whereupon, an adjournment was taken until Tuesday, July 26, 1955, 2:00 p.m.) [166]

July 26, 1955; 2:00 o'clock, p.m.

The Clerk: No. 14967-HW Civil, Yip Mie Jork versus John Foster Dulles, further trial.

Mr. Kidder: Ready for the plaintiff.

Mr. Dooley: Ready for the defendant.

Mr. Kidder: I would like to call to the stand Mr. Chew Jock.

The Court: I will make the usual order excluding all other witnesses.

CHEW JOCK

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified, through the interpreter, as follows:

The Clerk: Will you state your name?

The Witness: Chew Jock or Jock Chew.

Direct Examination

Q. (By Mr. Kidder): Where do you live, Mr. Chew? A. Now?

Q. Yes. A. Oakland, California.

Q. Do you have any business or occupation?

A. 4735 Congress Avenue, Oakland, California. I work on a farm and my son has a grocery store. I am living with him. [168]

Q. Where were you born? A. China.

Q. What place?

A. How Chow, Chung Shan Canton, China.

Q. What is the date of your birth?

A. January 12, 1896.

Q. Is that the American date or the Chinese date? A. Yes.

(Testimony of Chew Jock.)

Q. Which? A. American date.

Q. Of what country are you a citizen?

A. I am a citizen of this country.

Q. When did you first come to the United States? A. 1915.

Q. Have you ever made any trips to China?

A. Yes.

Q. How many? A. Two times.

Q. When was the first trip? A. 1926.

Q. When did you then return to the United States?

A. 1928, about five or six months. About fifth or sixth month, I returned.

Q. Where did you stay in China on that trip?

A. How Chow. [169]

Q. Is How Chow a village? A. Yes.

Q. When did you make your second trip to China? A. 1947.

Q. When did you return to the United States?

A. 1949.

Q. Where did you stay in China on that visit?

A. You mean 1947 to 1949?

Q. Yes.

A. Hin Bin Chin or Hin Bin Village.

Q. Where is Hin Bin Chin Village?

A. Not far from How Chow in the Chung Shan area.

Q. Did you ever hear of Kin Mo Village?

A. Yes.

Q. Where is Kin Mo Village?

A. South of Hin Bin Village or Chin.

(Testimony of Chew Jock.)

Q. About how far south?

A. I can't tell you how many lis, but you can walk about an hour's time to get there.

Q. Where is your birthplace, How Chow Village located with reference to Kin Mo Village?

A. From How Chow, the distance between How Chow and Kin Mo would be about an hour and forty-five minutes or two hours' time, walking time.

Q. Did you know a person by the name of Yip Dock? [170]

A. Yes.

Q. When did you first meet Yip Dock?

A. 1918.

Q. Where? A. Stockton, California.

Q. What were the circumstances of the meeting?

A. In Stockton, California I used to go to a Chinese grocery store by the name of Wah Kwen (phonetic) and there he also frequented that place and there we met.

Q. Did you see Yip Dock more than—strike that. You testified that you returned to China in 1926. Did you see Yip Dock more than once between your first meeting about 1918 and the time you returned to China in 1926?

A. From 1918 to 1919, when I was farming, I saw him many times that year, that period.

Q. What do you mean by many times?

A. I can't exactly tell how many times, but I would say about a half-dozen times or so, and every time when I came from the village to have my hair cut, I also met him.

(Testimony of Chew Jock.)

Q. Where would these meetings occur, in what city?

A. In Wah Kwen at Stockton, California, the grocery store.

Q. You testified you returned to China in 1926. Did you see Yip Dock in China at any time after 1926? A. Yes. [171]

Q. When did you first see him in China?

A. The first time I see Yip Dock?

Q. Yes, in China. A. In China?

Q. Yes.

A. About the eleventh month American date, November that year.

The Court: What year?

The Witness: 1926, the year I went to China.

Q. (By Mr. Kidder): Where did you see him at that time? A. At my home in my village.

Q. What village was that?

A. Hin Bin Village.

The Court: Was anybody with him at that time when you saw him in your home?

The Witness: The wife, his wife.

The Court: What was the wife's name?

The Witness: Wong She.

The Court: Was anybody else with him?

The Witness: No.

Q. (By Mr. Kidder): Did you see him in China more than once during this trip of yours between 1926 and 1928? A. More than once.

Q. When did you next see him after this meeting of about November 1926? [172]

(Testimony of Chew Jock.)

A. In December when I got married, I also invited him to come to my dinner or banquet.

Q. December of what year? A. 1926.

Q. Where were you married?

A. How Chow.

Q. Did Yip Dock attend your wedding banquet?

A. Yes.

Q. When did you next see Yip Dock?

A. The next time when I go over to his place for dinner or baby banquet.

The Court: Baby banquet?

The Witness: Yes. At the time when one month old they have a celebration something like our baptism party.

Q. (By Mr. Kidder): When you state "to his place," to what do you refer?

A. Kin Mo Village.

Q. Where did Yip Dock live, if you know, in what village did Yip Dock live? A. Kin Mo.

The Court: You say you went back in 1926. You saw him in November and you saw him again in December. When did you go over to his house for this baby banquet?

The Witness: 1928.

The Court: In 1928. What time in 1928? [173]

The Witness: About the second month Chinese calendar.

The Court: What is the second month Chinese calendar?

The Witness: Either March or April.

(Testimony of Chew Jock.)

The Court: When did you come back to the United States in 1928?

The Witness: About May or June.

The Court: Then this baby banquet occurred one or two months before you came back to the United States?

The Witness: I can't exactly remember. I think approximately a couple of months.

The Court: All right.

Q. (By Mr. Kidder): Do you know the name of the child for whom this banquet was held?

A. Mie Jork.

Q. When did you next see Yip Dock?

A. At the time when I came back to the United States.

The Court: You saw him here in the United States?

The Witness: Yes, at Stockton, California.

The Court: What year was that?

The Witness: About 1929.

Q. (By Mr. Kidder): Where in Stockton did you see him at that time?

A. He was ill at the hospital.

Q. What hospital?

A. I don't know the name. [174]

Q. Did you ever see Yip Dock after that time?

A. No.

Q. Going back a moment to this baby banquet, you stated you attended, where was this banquet held?

A. In the home of Yip Dock.

(Testimony of Chew Jock.)

Q. Did you ever later see the person named Yip Mie Jork? A. 1947.

Q. Where? A. At Hin Bin Chin Village.

Q. Where in Hin Bin Chin Village?

A. At my home.

Q. How long did you see Yip Mie Jork at that time? A. Three or four hours or so.

Q. Did you ever see Yip Mie Jork at a later date? A. Yes.

Q. When?

A. The next time is when my son got engaged and we had a party and he came for the festivities.

The Court: When who got engaged?

The Witness: My son.

The Court: What year was that?

The Witness: 1947.

Q. (By Mr. Kidder): Where was this engagement feast?

A. In my home in Hin Bin Village. [175]

Q. How long did you see Yip Mie Jork at that time?

A. It was longer, but I can't tell you how many hours, but longer than the last time.

Q. Would it more than a day?

A. More than half a day. Not quite a day.

Q. Did you ever see Yip Mie Jork at a later date?

A. The next year when my son got married, he also came again for the wedding feast.

The Court: That is 1930?

The Witness: Yes.

(Testimony of Chew Jock.)

Q. (By Mr. Kidder): What year?

The Witness: 1947 was the engagement. 1948 was the marriage, the wedding.

Q. (By Mr. Kidder): Where was the marriage held? A. In Hong Kong.

Q. Where did you see Yip Mie Jork?

A. The couple, my son and bride, got married in Hong Kong, but when they returned home, I gave them a celebration, the party, at my own home.

Q. Where was the marriage feast held then?

A. In my home in the village.

Q. Which village? A. Hin Bin Village.

Q. Did you ever see Yip Mie Jork at a later date?

A. 1949, before my return to the United States, I saw [176] him again in the village, my own village.

Q. Where in your village? A. My home.

Q. I now show you certain photographs contained in Plaintiff's Exhibit 1 in evidence and ask you if you can identify the persons depicted in the photograph in the upper left-hand corner of this group of four photographs, beginning with the individual on the left.

A. Yip Share Wong, Share Leung, Yip Mie Jork.

Q. I now show you a photograph in the upper right-hand corner of this group and ask you if you can identify the people in that photograph?

A. This is Yip Share Leung on the right; this looks like Mie Jork to me. It is so small.

(Testimony of Chew Jock.)

Q. I now show you a photograph in the lower left-hand corner of this group and ask you if you can identify this person? A. Yip Dock.

Q. Is this the person you have referred to as Yip Dock in your testimony? A. Yes.

Q. I now show you a photograph——

The Court: Yip Dock was the father?

Mr. Kidder: Yes.

The Court: The father he saw in China? [177]

Mr. Kidder: Yes.

The Court: All right.

Q. (By Mr. Kidder): I now show you a photograph in the lower right-hand corner of this group and ask you if you can identify this individual?

A. It looks like Share Wong to me.

Q. Have you ever seen any of these photographs before in this group?

A. This is my first time.

Q. I now show you Plaintiff's Exhibit 5 in evidence and ask you if you can identify the three persons in that photograph beginning with the individual on the left.

A. Left side is Share Wong, Share Leung, Mie Jork on the right.

Q. Who is Yip Share Wong?

A. Younger brother of Mie Jork.

Q. Have you ever seen Share Wong?

A. Yes.

Q. Where?

A. You didn't ask me a while ago, but when we

(Testimony of Chew Jock.)

had these two parties, the engagement and the wedding banquet, he was also there.

Q. Have you ever traveled from Macao to your home village?

Let me amend that to Hin Bin Chin Village.

A. Yes.

Q. How do you travel, by what means?

A. Some kind of a boat with a sail.

Q. How long does it take to travel from Macao to your home village, approximately?

A. If the tide is good and high, it is eight or nine hours, but if the tide is low, ten to eleven hours. There is no certainty as to exactly how many hours, depending on the tide.

Mr. Kidder: I have no further questions of the witness.

The Court: I want to ask the witness a question or two. You have identified this photograph in Exhibit 1 as Yip Mie Jork?

The Witness: Yes.

The Court: How old was Yip Mie Jork when you saw him the first time?

The Witness: When he was a month old.

The Court: How old was he when you saw him the next time?

The Witness: 19 or 20. It was 1947 and he was about around 19 or so.

The Court: Then you saw him when he was two months old first and the next time he was 19 or 20?

The Witness: That is right.

The Court: I haven't any other questions.

Mr. Kidder: I have no further questions. I might say [179] his testimony was not offered for identification in 1947. It was offered only to cover the birth, his knowledge of the birth.

The Court: Of course, I guess we can assume that this boy was born. I don't know what his name was, but he was born, at least. This might be the plaintiff or it might not be, but somebody was born.

Mr. Kidder: The only purpose of this testimony was that. I have no further questions of this witness.

The Court: All right. Is this your last witness?

Mr. Kidder: Yes, he is my last witness.

The Court: Have you any other testimony?

Mr. Kidder: I have no further testimony.

The Court: You may step down.

(Witness withdrawn.)

Mr. Kidder: I would like to offer at this time for the possible use of the court these maps I have used, one in Chinese, which bears some identification, and an enlarged section of this same map for possible use. I would like to have the interpreter identify these Chinese maps, if I may.

Mr. Dooley: Your Honor, I object on the ground that there is no proper foundation, irrelevant, hearsay, and incompetent, and on the additional ground that prior to showing the maps to the witnesses they were marked by the interpreter.

The Court: I think the objection as to foundation, [180] lack of foundation, is good. I don't know who made these maps or how they were made. I will sustain the objection to the maps.

Mr. Kidder, before the defendant proceeds with cross examination, this last witness testified he saw the plaintiff when he was two months old and didn't see him again until he was 19, and yet he identified him right off. How in the world can a witness tell that from a two months baby to 19 years old?

Mr. Kidder: Not at all. His testimony was not offered for that purpose. He testified he saw the boy in 1947 named Yip Mie Jork. That is the only connection between the birth and 1947. He didn't say it was the plaintiff. He said it was a person named Yip Mie Jork. He identified that person as the person in the photograph, your Honor.

The Court: I reopened the case for the purpose of allowing you to produce additional testimony. The first witness didn't see the plaintiff until he was six years old.

Mr. Kidder: That would be the young lady.

The Court: Then the second witness saw the plaintiff when he was seven or eight years old. The third witness didn't see the plaintiff until ten or eleven years old.

We are going to have to assume that there was a marriage, I think there was a marriage, and also that there were children born of this marriage. There is nothing here to establish the fact that the alleged plaintiff is the child that was born to [181] these parents.

This last witness is typical of this case, that is, he saw a baby two months old, next saw him 17 years of age.

When this case was originally tried, the parties

who testified hadn't seen the plaintiff until they saw him in Macao when the boys were 19 or 20 years of age. I think you have to have something more than just general reputation. That is what you have tried to establish here.

Mr. Kidder: With respect to the first witness, assuming that she didn't actually didn't see him until he was six or seven years of age, she was born on the same street as he was, she saw him when she was a little schoolgirl and they played on the streets together. This boy is in the Yip house.

The Court: Let's assume that. Can we assume because a boy lives in a certain house that he is the son of the alleged father?

Mr. Kidder: We have testimony from the last witness, for example, that he in 1928 attended a birth feast in the home of Yip Dock for a boy known as Yip Mie Jork, which I think establishes there was a boy born at that time by that name.

Then we come along next with the testimony of this girl who lived in the same row of houses, who played with a boy by the name of Yip Mie Jork who came from the same household on the street. She attended school with this boy. Although [182] they were in different classes, she attended the same school. She saw him until 1948 in the village. His name is Yip Mie Jork and he lives in this house.

Then you have the testimony of a relative, I say it is distant, but in going back over it, she says her grandmother was a sister of the grandfather, and she first knew this person at the age of eight or nine years. She knew him as Yip Mie Jork. He

comes from the same household. She identified the mother by photograph, and she identified the father by photograph. It is the same one. They testified there was the same photograph in the family home.

You have Chin Shee, the witness who, granted, doesn't know the boy, but he did take articles back there, personal belongings from the United States to the mother in 1935. They are the personal belongings of Yip Dock who has been identified as the father, the one who died. He has his photograph taken with this boy in 1947 at this burial ground. He also saw him again in 1949.

You have Russell Chan, the second witness, who saw Yip Mie Jork when Chan was about eight or nine years old. His mother and this witness visited at the home, in the Yip home. They saw him several times. They saw him up until 1938, saw him again up to 1947 and 1950.

The relative testified she stayed as long as one month in this particular home. I think, if I remember rightly, she [183] said several times she stayed as long as a month in the Yip home, and here is this boy who we say is the plaintiff Yip Mie Jork in the home with the mother, who we say is the mother Wong She.

I think if that testimony is considered as a whole that it does show a pattern where there was a boy born in 1928 who has been identified as the plaintiff, the son of Yip Dock.

The Court: Well, this last witness, I don't think the testimony of this last witness is valid when he

identifies this photograph. I don't know how in the world he can do that.

Mr. Kidder: He saw him several times in 1947 and he saw him several times in 1949.

The Court: He testified he never saw the boy from the time he was two months old until he was 19 or 20.

Mr. Kidder: Yes. I knew that when I put him on. I believe if I saw someone, and your Honor, too, sometime in 1947 and saw him again in 1949, you would be able to identify a photograph, a recent photograph. Those photographs are recent ones, 1947, and the other 1949. There may be one later than that. No, they are all 1949. I believe we could identify the person we had seen for several times in that recent time. I agree there would be no way for him to know that this was the same baby he saw when the baby was one month or two months old, but he didn't testify to that. He testified he saw a person by the name of Yip Mie Jork, and that is our [184] whole testimony, that he identified Yip Mie Jork who has been identified by other people as the son of Yip Dock.

The Court: Mr. Dooley, what have you got to say?

Mr. Dooley: I say not only is the testimony insufficient to establish the plaintiff's case, but I don't think the testimony is to be believed. I have certain impeaching documents here with respect to one or two of the witnesses that I would like to develop on cross examination. I think the testimony is incredible.

The Court: Supposing we proceed with the cross examination, but I want to finish this case this afternoon.

Mr. Dooley: Yes, your Honor. I will see if I can't develop it rather rapidly. I will take the last one, Chew Jock.

CHEW JOCK

Cross Examination

Q. (By Mr. Dooley): Mr. Chew, you testified, I believe, that in 1926 you saw Yip Dock in China, is that correct? A. Yes.

Q. And you met his wife at that time?

A. At the time when I was married, yes.

Q. Did you meet Yip Dock's wife?

A. Yes.

Q. Were you introduced to Yip Dock's wife?

A. Yes, Yip Dock introduced her. [185]

Q. Where did that take place?

A. They came to my home.

Q. And Yip Dock introduced you to his wife?

A. Yes.

Q. Were you then introduced to any of Yip Dock's children? A. No.

Q. Do you know of a child of Yip Dock by the name of Chin Shee?

Do you know the name of a child of Yip Dock by the name of Yip Jeang Shing? My spelling is J-e-a-n-g S-h-i-n-g? A. No.

Q. How many children of Yip Dock did you know? A. Three.

Q. What were the names of these three?

(Testimony of Chew Jock.)

A. Yip Share Leung, Yip Mie Jork, and Yip Share Wong.

Q. Did you ever discuss that with Yip Dock his children?

A. All he said is, "I have some children in China, Hong Kong—not Hong Kong, but the village."

Q. How many did he say he had?

A. Three or four.

Q. There was no child in China in his home in 1926 besides Yip Mie Jork?

Mr. Kidder: I will object to that on the ground that the [186] evidence doesn't show that Yip Mie Jork was there in 1926.

Mr. Dooley: I withdraw that.

Q. Was there any child in China in Yip Dock's home in 1926?

A. There were a lot of children running around there. I don't know how many there were there.

Q. In his home?

A. In the entrance of the house and around the home there.

Q. About how many children were running about the home in 1926?

A. You mean Yip Dock's home?

Q. Yip Dock's home.

A. In 1926? In 1926, he came over to my home for the party, for the feast.

Q. Did you go to his home in 1926?

A. No.

Q. Did you go to his home in 1928?

A. Yes.

(Testimony of Chew Jock.)

Q. Was that the time that the children were running around Yip Dock's home, in 1928?

A. That's right.

Q. How many children were there running around Yip Dock's home in 1928?

A. I can't tell you how many. [187]

Q. How old were the children running around Yip Dock's home in 1928?

A. I don't want to make the definite statement of their ages, but some may be eight or nine, some may be two or three years old.

Q. How many were there, were there about six or seven running around the home?

A. A few of them come in and a few of them go out and I don't know how many. They were just children playing around.

Q. You don't know whether they were Yip Dock's children or not, is that it?

A. The one that was having the full moon party was Yip Dock's baby.

Q. Were there any of the others his children in his home that were running around?

A. There were children running around. I cannot tell who they belonged to, but there was a baby born to him when I went to the party.

Q. But he didn't tell you whether the other children running around were his or not?

A. Nobody mentioned whether they were or not to me.

Q. In your trip during 1926 to 1928, did you

(Testimony of Chew Jock.)

visit any other persons in China that you can recall, excluding Yip Dock? A. No. [188]

Q. Are you sure of that? A. No.

The Court: The only person you visited then was Yip Dock?

The Witness: Yes.

Q. (By Mr. Dooley): Were you introduced to any other person in China besides the wife of Yip Dock? A. No.

Mr. Dooley: If the court please, may I mark this Defendant's Exhibit A for identification?

The Court: It may be marked for identification.

The Clerk: Exhibit A.

(The document referred to was marked Defendant's Exhibit A for identification.)

The Court: May I ask this witness a question? How many wives did Yip Dock have?

The Witness: All I know is Wong She.

The Court: Did Yip Dock ever tell you he had another wife?

The Witness: He has not mentioned that to me.

Q. (By Mr. Dooley): Mr. Chew, I show you Defendant's Exhibit A for identification and call your attention to the writing in Chinese near the bottom of this exhibit and ask you whether this is your signature? A. Yes. [189]

Q. Defendant's Exhibit A, I am going to read from this exhibit and ask you whether this question was asked you on or about the date of this document, June 13, 1928, and whether this is the answer that you gave. I will withdraw that, your Honor.

(Testimony of Chew Jock.)

When you returned to the United States in 1928, did you come through the Immigration Authorities?

A. Yes.

Q. And did you make any statement to the Immigration Authorities?

A. I don't remember. Maybe I have. I am sure there must be some questions.

Q. I am going to read your statement from Defendant's Exhibit A for identification and ask whether this question was asked by the immigration authorities whether this was your answer.

"Q. Did you visit any resident of this country who happened to be at his home during your recent stay in China, or did you visit the home of such resident? "A. No."

Was that question asked you and was that the answer you gave?

A. You mean in 1928 they asked me where I have been when I was in China?

Mr. Dooley: Repeat the question to the witness.

The Court: Read the question to the witness.

The Witness: You mean if I have ever been a witness to anybody?

Mr. Dooley: Will you translate the question for the witness?

The Witness: I can't recall what was asked me at that time.

The Court: The question hasn't been asked yet.

The Witness: No. I didn't answer that way.

Q. (By Mr. Dooley): I am going to read another question from Defendant's Exhibit A and ask

(Testimony of Chew Jock.)

you whether this question was asked you and whether this was the answer you gave.

“Q. Were you introduced to the son, daughter or wife of any resident of this country?

“A. Wong Sue Ngit, wife of Jeung Yuk Sung, living in Ling Gung Village.”

Was that question asked you and was that your answer? A. Yes.

Q. And why is it, Mr. Chew, you did not mention the wife of Yip Dock?

A. They never asked me that question.

Q. Did they not ask you, were you introduced to the son, daughter or wife of any resident of this country, Mr. Chew?

A. I cannot recall nor remember what they asked me at that time. [191]

Q. But you did, Mr. Chew, give the name of Wong Sue Ngit, wife of Jeung Sung?

A. They didn't ask me, so I didn't tell.

Q. But you stated a moment ago, did you, Mr. Chew, that you were not introduced to anyone else except the wife of Yip Dock, did you not?

A. This is a different person. This is a different village. This party is not of the same village.

Mr. Dooley: Your Honor, the defendant offers in evidence Defendant's Exhibit A for identification as Defendant's Exhibit A.

Mr. Kidder: I object to it on the ground it is immaterial and irrelevant and doesn't go to any impeachment of this witness here.

The Court: If there is an objection on the ground

(Testimony of Chew Jock.)

it is irrelevant and immaterial, I will have to overrule the objection. I think it is material. I think they can show contradictory statements at some previous time.

Mr. Kidder: This is on a collateral matter. Here is a man who for two years——

The Court: But the thing the court has to determine in all these cases is whether or not he believes the witness. The credibility of a witness is very important in these cases. Anything that throws any light upon the credibility of the witness, I think is important. Objection overruled. [192]

The Court: Exhibit A.

(The exhibit heretofore marked Defendant's Exhibit A was received in evidence.)

Q. (By Mr. Dooley): Now, Mr. Chew, you were a very good friend of Yip Mie Jork, is that correct? A. Yes.

A. He attended your son's wedding and your son's engagement, is that correct? A. Yes.

Q. When did you first meet Yip Share Leung?

A. 1918 in Stockton.

Q. How old was Yip Share Leung in 1918?

A. Over ten years old.

Q. You have known Yip Share Leung through the years, is that correct? A. Yes.

Q. When was the last time you saw Yip Share Leung?

Mr. Kidder: I object on the ground it is ambiguous. Before when?

(Testimony of Chew Jock.)

Q. (By Mr. Dooley): Before the present trial, before today.

A. About 1943 in San Francisco.

Q. Do you know Yip Sue Mong? A. No.

Q. Do you know any of the children of Yip Share Leung? [193]

A. You mean the children of——

Q. Of Yip Share Leung?

A. Sue Mong, See Mon or Mong, or Sue Mon.

Q. When did you meet Yip See Mon?

A. 1943.

Mr. Dooley: No further questions.

The defendant would like to cross examine Chin Shee.

The Court: Maybe the plaintiff would like to examine this witness further.

Mr. Kidder: May I see the last exhibit?

Redirect Examination

Q. (By Mr. Kidder): You testified, Mr. Chew, that you last saw Yip Share Leung in 1943. That is before the present date, is that right?

A. 1943.

Q. Were you here at the trial last week when it began?

A. I didn't understand what you meant by the last time. Yes, I was here last week with him.

Q. Was Yip Share Leung here at the same time?

A. Yes.

Q. When did you meet this person you testified last about, See Mon, when did you first meet him?

(Testimony of Chew Jock.)

A. 1943.

Q. Where? A. San Francisco. [194]

Q. I show you Defendant's Exhibit A and ask you if the answers appearing in English were written by you on this particular form?

A. Not mine. I just have to write my name there.

Q. Do you recollect whether the information given on this form was read to you before it was signed by you?

A. Well, I was being inquired and I was asked to sign my name here. I don't know what is in the paper.

Q. Who is this person Jeung Yuk Sung mentioned in Exhibit A? A. A friend of mine.

Q. Where is Ling Gung Village?

A. I don't know where the village is located. I just know this man in America.

Q. Is this Ling Gung Village in the Chung San District?

A. I really don't know where that village is. I don't know the location.

Mr. Kidder: Nothing further.

The Court: All right. Which witness do you want to call now?

Mr. Dooley: I would like to ask one or two more questions.

Recross Examination

Q. (By Mr. Dooley): Mr. Chew, who approached you with regard to testifying [195] in this case?

A. In San Francisco when I saw She Mang and he asked me to help to testify in this case.

(Testimony of Chew Jock.)

Q. Was that Yip She Mang? A. Yes.

Q. When did you first meet Yip She Mang?

A. You mean what period of time the first time?

Q. The first time. A. 1943.

Q. And Yip She Mang lives in San Francisco, is that correct? A. Yes.

Q. Did you know that She Mang is related to Yip Mie Jork?

A. Yes. They are uncle and nephew, or something like that.

Q. How long had Yip She Mang lived in San Francisco?

A. That I wouldn't know, because I was in San Diego before and in 1943, when I went to San Francisco, I met him.

Q. And you lived in San Francisco at the same time as Yip She Mang from 1943 to the present?

A. No. I go to San Francisco for a few days at times and then I return to San Diego.

Q. During your trips to San Francisco, would you see Yip She Mang? [196]

A. Yes.

Q. How often would you see Yip She Mang?

A. Many times. I can't tell you exactly how many times. Sometimes when he returns home from school, I would buy him cold drinks, and sometimes we go for tea. Sometimes I take him out for a meal.

Q. Did you see Yip She Mang during 1953?

A. When I refer to 1943 I misheard. It is supposed to be 1953 when I met him.

Q. You did see him in 1953? A. Yes.

(Testimony of Chew Jock.)

Q. Several times? A. Yes.

Q. Did you discuss the family affairs of Yip Dock with him?

A. We talked about work and jobs, and so on, not about family affairs.

Q. Did you ask him about Yip Mie Jork?

Mr. Kidder: May I ask, are you referring to 1953?

Mr. Dooley: 1953, yes.

The Witness: I don't think so.

Q. (By Mr. Dooley): Did you see Yip She Mang in 1954 in San Francisco? A. No.

Mr. Dooley: No further questions. [197]

Mr. Kidder: Nothing further.

The Court: Call your next witness.

The Witness: Remember, it is not 1943, but 1953 I was referring to.

(Witness excused.)

CHIN SHEE

a witness called for and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows:

Cross Examination

Q. (By Mr. Dooley): Mr. Chin, last week you testified that you went to China in 1935, is that correct? A. Yes.

Q. And you returned in 1936? A. Yes.

Q. And you testified you took certain articles to China during that trip, is that correct?

(Testimony of Chin Shee.)

A. Yes.

Q. And you took those articles to Yip Dock's wife, is that correct? A. Yes.

Q. And you went to the home of Yip Dock's wife, is that correct? A. Yes. [198]

Q. And while there, you were introduced to Yip Dock's children, is that correct?

A. Mrs. Yip Dock did introduce.

Q. Mr. Chin, when you came back to the United States in 1956, did you go through the immigration authorities? A. Yes.

Q. Did you make any statements to the immigration authorities at the time you returned to the United States? A. Yes.

Mr. Dooley: Will the clerk please mark this Defendant's Exhibit B for identification, which purports to be a statement from an official immigration file relating to Chin Shee.

Mr. Kidder: I move to strike that on the ground the document itself is the best evidence of what it is.

The Court: It is only introductory.

Mr. Dooley: It purports to be, I said.

The Court: Denied. You may proceed.

(The document referred to was marked Defendant's Exhibit B for identification.)

Q. (By Mr. Dooley): Mr. Chin, I show you Defendant's Exhibit B for identification and refer you to the Chinese characters near the bottom of the page and ask you whether that is your signature.

A. Yes.

Q. I am going to read to you from Defendant's

(Testimony of Chin Shee.)

Exhibit [199] B for identification and ask whether that question was asked you or whether this was the answer you gave on about December 18, 1936?

“Q. Did you take any money, letters, or anything else from the United States to anyone in China on this trip, and if so, to whom? “A. No.”

A. The package I brought was not a gift brought back for anybody. It was something that was inherited, left from the deceased to be conveyed back to the family. It was not a gift.

Q. Was that question asked you and was that the answer you gave?

A. When they asked me the question, everybody was in a rush getting ready to get ashore at that time when the questions were asked.

Q. Was that question asked you and was that the answer you gave? A. I don't remember.

Q. You stated that the material that you carried back was an inheritance so you didn't consider that a gift? A. I classified that that way.

Q. Next I am going to read another question from this Defendant's Exhibit B and ask you whether this question was asked you and whether this was the answer you gave: [200]

“Q. Were you introduced to the son, daughter or wife of any resident of this country?

“A. No.”

Was that question asked you and was that the answer you gave?

A. I don't remember such a question or the answer to it.

(Testimony of Chin Shee.)

Mr. Kidder: I move that the last question be stricken if the Government is using that for impeachment purposes, because there is no testimony in the record that he was introduced to the wife of any resident, and also that the wife of any resident would probably refer to a living person. At that time Yip Dock was dead.

The Court: He testified he went to see the wife. The wife said, "I have these two children."

Mr. Kidder: The question is, "Were you introduced to the son of any resident of this country." If you take that literally, you would have to be introduced, and certainly it would have to be a resident of this country, and at that time Yip Dock was dead.

I don't know how they ask these questions.

The Court: He says he doesn't remember.

Mr. Kidder: I object on the ground if he is using this for impeachment purposes, that I would make a motion that it be stricken because it is not impeachment. [201]

The Court: I think he has the right to ask the question. The man says he doesn't remember.

Mr. Dooley: The defendant offers Defendant's Exhibit B for identification into evidence as Defendant's Exhibit B.

The Court: Now, I will sustain an objection. You are objecting to the introduction?

Mr. Kidder: On the ground it is not proper impeachment and no foundation has been laid for it.

The Court: Sustained. When a man says he

(Testimony of Chin Shee.)

doesn't remember, how are you going to impeach him? If he said, yes, that was the question and that was the answer, it could go in because he admits it.

Mr. Dooley: I believe you can introduce it when either he denies it or says he doesn't remember.

The Court: I will sustain the objection.

Mr. Dooley: Otherwise, if I had an impeaching statement, the opposing side could always keep it out by saying, "I don't remember."

The Court: That is right. You cannot use that as an impeaching statement unless you can produce the people who heard him say it and put it down. I don't know who wrote it down.

Mr. Dooley: It bears a signature.

The Court: It is written in English and this man evidently doesn't understand English or can't write it. Not [202] only that, it is written on the typewriter. If the witness will admit that that question was asked and that was the answer, it can go in, but when he says, "I don't remember," I don't know how you are going to get it in.

Objection sustained.

Q. (By Mr. Kidder): Mr. Chin, you obtained certain articles, you testified, from your brother. Was that where you got the articles you took to China? A. Yes. In a suitcase.

Q. When did you get these articles from your brother? A. About the end of 1935.

Q. When did Yip Dock die?

A. I think it was around 1929 or thereabouts.

(Testimony of Chin Shee.)

Q. So it was about six years after Yip Dock's death that you took these articles to China?

The Court: My understanding is the question was, "When did you get the articles?"

Mr. Dooley: Right.

The Court: Let's don't confuse the question. It was six years after the death before he got the articles, is that right?

Mr. Dooley: He went back then.

The Court: The question was, "When did you get the articles?" He said about six years.

Is that right? [203]

You didn't get this suitcase until about six years after Yip Dock's death?

The Witness: My older brother was taking care of his affairs, this Yip Dock's affairs, and his belongings. Maybe if there were somebody whom they could trust and who was leaving for China before my time, maybe the other man might have taken them.

The Court: Then you got these articles from your older brother, is that right?

The Witness: My older brother took advantage of the fact that I was leaving for China at the time when I left and gave me that to be delivered back to the family.

The Court: How long before you left for China did you get these articles?

The Witness: Before my departure, three or two weeks before my departure.

(Testimony of Chin Shee.)

Q. (By Mr. Dooley): Do you know where those articles were between 1930 and 1935?

A. My brother?

Q. Your brother kept them, is that correct, the articles, during that period?

A. It was in my brother's custody.

Q. At the time that you took those articles to China, did you know whether Yip Dock had any children in the United States? [204]

A. Yes.

Q. And at the time your brother was keeping the articles, do you know whether Yip Dock had any children in the United States?

A. You mean if my brother knew of it or not?

Q. Did you know? A. Yes.

Q. Now, Mr. Chin, do you know Yip Share Leung? A. Yes.

Q. When did you meet Yip Share Leung?

A. In Stockton.

Q. When was that?

A. I can't tell you the exact year. Near the vicinity of 1919 or 1920.

Q. Did you see Yip Share Leung during the year 1952? A. Yes.

Q. Did you see Yip Share Leung during the year 1953? A. Yes.

Q. Did you see Yip Share Leung during the year 1954? A. You mean last year?

Q. That is correct. A. Yes.

Q. While you were in China, Yip Mie Jork visited you several times, is that correct?

(Testimony of Chin Shee.)

Mr. Kidder: I object on the ground there is no testimony [205] he visited him.

The Court: Read the question.

(Question read.)

The Court: Overruled. This is cross examination.

The Witness: Yes.

Q. (By Mr. Dooley): And you were a very good friend of Yip Mie Jork, is that correct?

A. Yes.

Q. During 1953 and 1954 did you ever ask Yip Share Leung about Yip Mie Jork?

A. You mean ask of whom?

Mr. Dooley: Read the question.

(Question read.)

The Witness: That was the time when I was in America. You mean if I asked of him through Share Leung in America when I was in America?

Q. That is correct.

A. I guess I must have asked about how the family are faring, and so on.

Q. Then you knew that Yip Mie Jork had an action pending to be declared a citizen of the United States?

Mr. Kidder: Your Honor, I will object on the ground it is immaterial.

The Court: Sustained. Mr. Dooley, I don't know how much longer you want to go on with this witness. It seems to [206] me you are just wasting your time. We have 15 minutes. If you want to

(Testimony of Chin Shee.)

cross examine the other witnesses, I suggest you go ahead and do it.

Mr. Dooley: I guess I had better get another witness.

The Court: Do you have any other questions, Mr. Kidder?

Mr. Kidder: No questions.

The Court: All right.

(Witness excused.)

Mr. Dooley: I will call the number one witness.

LEONG LAN GIN

a witness called for and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows:

Cross Examination

Q. (By Mr. Dooley): Mrs. Leong, you were a pretty close friend of Yip Mie Jork, is that correct?

A. Yes.

Q. You grew up together, is that correct?

A. That's right.

Q. And you used to visit each other's home, is that true? A. Yes. [207]

Q. Now, when the trial took place during May of 1955, you didn't want to testify on behalf of Yip Mie Jork, is that true?

Mr. Kidder: I will object on the ground it is immaterial whether she wanted to testify or not. It has no bearing on any of the issues.

The Court: Overruled.

(Testimony of Leong Lan Gin.)

The Witness: The first time I was not here.

Q. (By Mr. Dooley): Isn't it true that Yip Share Leung asked you to testify on behalf of Yip Mie Jork and you refused to do so?

A. I think Yip Share Leung approached my husband to come to testify.

Q. And he did not approach you?

A. Because I have children at home. If I was not necessary, naturally I would rather stay home and take care of my children and let my husband come. I am willing to come because my husband couldn't come.

Mr. Dooley: No further questions, your Honor.

Redirect Examination

Q. (By Mr. Kidder): Mrs. Leong, now that you have come to testify at the trial, was your testimony all truthful?

Mr. Dooley: I object, your Honor.

The Witness: Yes. [208]

Mr. Dooley: On the ground the witness has taken the oath to tell the truth.

The Court: It is presumably true. Overruled.

The Witness: Yes.

Mr. Kidder: I have no further questions. I would like to point out in our affidavit to reopen, we did not suggest that this witness was not available on the first occasion. No further questions.

The Court: Mr. Dooley, do you want to cross examine the other witnesses?

Mr. Dooley: No, your Honor. I will reserve the

remaining time for anything the court might want to hear in the way of argument.

(Witness excused.)

The Court: As far as this last witness is concerned, what I picked out from her original testimony is she testified that she didn't meet the plaintiff until she was about six years of age that she could remember. I doubt very much that a youngster six years of age can remember that well. Maybe people can remember a great deal better than I can, but six years of age seems pretty young to remember. She testified that the plaintiff at that time was about five years of age. No, she testified the plaintiff was five years older than she was, which would make the plaintiff eleven. If this witness was six and the plaintiff was five years older, it would be [209] eleven. It seems improbable to me that an eleven-year-old boy would play with a six-year-old girl.

Mr. Kidder: Your Honor, may I say something, not on this witness, but if your Honor would give us a little more time, the half-brother is here.

The Court: I don't mind. You can bring the others all in.

Mr. Kidder: I make the request only for the half-brother. I wanted him to be here when you were ruling.

The Court: All right.

When this case was originally tried in May, I was not at all satisfied with the testimony of the various witnesses. The thing we are interested in all these cases is whether or not the alleged son is

really the son of the alleged father. In this particular case at the original hearing, the trial we had, there was no one who could testify as to the paternity, because the only witnesses who were able to testify testified that they heard the boy was born. They didn't see the boy then. These other witnesses said they didn't see the plaintiff until he was 18 or 19 years of age when they saw these two boys in Macao.

I asked the half-brother how he knew that the party he alleged, that he identified as Yip Mie Jork was Yip Mie Jork, and he said he just felt it, he talked and discussed the family relationship, so he just knew he was his half-brother. [210]

I think it takes more than that to justify a finding of paternity.

I rendered a judgment in favor of the defendant in this case.

Subsequent thereto, there was a motion made to reopen for the purpose of producing additional witnesses to throw some light upon the situation, and I was hoping that we could have a witness who could testify as to the birth of the boy and also testify that he had seen the boy grow up in the home, and so on. But we have witnesses who can only testify partially. One of the main things in these cases is the credibility of the various witnesses.

The only thing the Government has to do in these cases is to try to break down the credibility of the witnesses, to see whether or not the witness is telling the truth. When we try to determine whether

or not all the pieces will fall in together and will add up to the total sum or bring the conclusion we want, we have to rely upon the testimony of witnesses.

What we are trying to do is to determine whether or not the witnesses are telling the truth, and if they are, whether or not the stories will jibe.

The first witness that was brought in was Leong Lan Gin. She testified she was born in Kin Mo Village CR 19-7-19, which was translated as September 11, 1930. She testified [211] she lived in that village until she was 18 years of age. Said that she first remembered the plaintiff when she was six years old. The plaintiff was five years older than she was, which would make the plaintiff eleven.

It seems to me that it is very strange that a eleven-year-old boy will play with a six-year-old girl. However, although it is strange over here, it may not be strange in China.

There is one thing I am particularly interested in. The witness said she was born September 11, 1930. The plaintiff was born February 22, 1928. There is a two and a half-year difference between the plaintiff and the witness. The witness testifies there is five years difference. You just cannot make a mistake of fifty per cent, a mistake of two and a half years. If they were 18 or 20 or 22, it wouldn't make any difference, but when a youngster is five years, it makes a lot of difference. So there is the first discrepancy in the witnesses' testimony.

Now, as far as Russell Chan is concerned, he cannot testify the plaintiff was the son of the al-

leged father. He never saw the plaintiff until—I don't know whether he testified he never saw him until he was four years of age or seven or eight years of age, but, however, he can't testify the son was actually born to this alleged father and mother.

Now, Fay Jean Chew didn't see the plaintiff until he was [212] eleven or twelve years of age. How can this witness testify that the boy was actually born to the alleged mother?

Chin Shee didn't see the plaintiff until he was eleven years of age. Chin Shee said he went back to China. He took the belongings of the father back to the alleged mother and he said the alleged mother, "I have these two children." He didn't say that she said, "These two children belong to the alleged father." Just, "I have these two children."

So, I just don't think the court is justified in finding for the plaintiff on this sort of testimony. The Circuit Court has just written an opinion, I didn't bring it in with me, I didn't know I was going to refer to it, in which the Supreme Court pointed out that these are precious rights, they shouldn't be taken away from the alleged children without substantial proof. On the other hand, these are sacred rights and they shouldn't be given to anyone without some substantial evidence. I don't think the evidence is substantial, that there is enough in this case.

Mr. Kidder, I reopened the case for you because I wanted you to present any evidence you had. The Circuit leans over backward in these cases in favor of the plaintiff. The Circuit may decide there is

enough evidence in this case to justify a finding in favor of the plaintiff, but I just don't find it.

Mr. Kidder: We have, of course, presented the best [213] witnesses we have. It is unfortunate that there are not other members of the family who are available who can testify in his behalf.

The Court: You know, I have said from the bench before that I consider the best testimony we can have is the testimony of the mother and father, particularly the mother. In this case we have neither the mother nor father. They are both dead.

Mr. Kidder: That is right.

The Court: But now, what have we got? The testimony of a half-brother. I asked the half-brother how he knew. He just felt it. You can't grant citizenship upon a feeling in the mind of a half-brother.

Mr. Kidder: I think he mentioned the family relationship. If a person had not seen the brother for many years, it is reasonable to think that he would talk with the brother about the family and that between the two they should arrive at a conclusion who their parents were, whether it is a half-brother or not.

The Court: I know, but we can talk about family relationship, particularly if we have someone in the family who is very inquisitive, without establishing the fact there is a father and mother relationship.

Well, I wanted to give you the opportunity to present all the evidence you have. I am very sympathetic with these [214] claims and I want you

to present all the evidence you have. Maybe if you will take this to the Circuit, the Circuit will decide there is sufficient evidence in this case to justify the court in determining that the claim of the plaintiff is valid. I am not holding that the claim of the plaintiff is not valid. I am just holding that the plaintiff has not sustained the burden of proof in establishing that in the mind of the court.

Mr. Kidder: We have presented all the evidence we have available to us. The only other one would be the plaintiff, who is not available to us, and that is because the defendant will not let him come.

The Court: Just because there is a child in the home, I don't think that is an indication that the woman in the home is the mother of the child, or the father who goes to the home is the father of the child. In China, the Chinese people have a strong feeling of family responsibility. Of course, there is no evidence here that this alleged mother took a stranger into the family or relative into the family, but, however, it is possible such a thing happened.

So when we don't have any body to tell that he was there when the child was born, "I remember this child from now until he is six years of age," when the next witness can pick him up, there is a gap that I don't think you have been able to cover at all. All you have got is from the date of [215] the birth of the child, and then there is a gap until he is six years of age when he was found in the home of Yip.

Mr. Kidder: We do have, your Honor, files of

Yip Dock, the father, to the effect that he had a son born on a particular day.

The Court: That is right, but we don't have anything to show that this was the boy.

Mr. Kidder: We then show that beginning about six he is in the home.

The Court: Mr. Kidder, I don't agree with you. However, I agree you have a right to make your record. I have allowed you to make your record. You have got all the evidence you can get.

Judgment will be for the defendant. The defendant will prepare the findings of fact and conclusions of law. [216]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of October 1955. [217]

.....

Official Reporter

[Endorsed]: No. 14925. United States Court of Appeals for the Ninth Circuit. Yip Mie Jork, Appellant, vs. John Foster Dulles, as Secretary of State, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: October 28, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14925

YIP MIE JORK, Appellant,
vs.

JOHN FOSTER DULLES, as Secretary of State,
Appellee.

APPELLANT'S STATEMENT OF POINTS

Yip Mie Jork, as appellant herein, presents herewith the following statement of points upon which he intends to rely on appeal.

The District Court erred in finding as a fact that:

1. The evidence adduced to establish that he is the lawful blood son of Yip Dock was scant; that the witnesses who testified on his behalf had little real knowledge of the claimed relationship and their

testimony was, in many respects, improbable and unworthy of belief.

2. Appellant failed to sustain the burden of proving he is a national or citizen of the United States and failed to present sufficient credible evidence to sustain the burden of proving that he is the lawful blood son of Yip Dock.

The District Court erred in concluding as a matter of law that:

1. The appellant failed to sustain the burden of establishing his claim to United States nationality.

2. The appellee is entitled to judgment and costs.

Dated: October 10, 1955.

/s/ MARSHALL E. KIDDER,
Attorney for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 28, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD

Appellant hereby designates, pursuant to Rule 17 (6) of the Rules of Practice of this Court, a portion of the record which is material to the consideration of the appeal, and which should be printed:

1. Petition for Declaratory Judgment under Section 503 of the Nationality Act of 1940.

2. Answer.

3. Stipulation and Order for Substitution of Party Defendant.

4. Findings of Fact and Conclusions of Law, dated June 2, 1955.

5. Judgment entered June 2, 1955.

6. Order Setting Aside Judgment, Findings and Conclusions and Reopening Case.

7. Findings of Fact and Conclusions of Law, dated August 10, 1955.

8. Judgment entered August 11, 1955.

9. Transcript of the trial in the United States District Court.

10. Notice of Appeal.

11. Stipulation regarding consideration of exhibits in original form.

12. Appellant's Designation of Record.

Counsel for the parties have stipulated, subject to the approval of the Court, that appellant's Exhibits 1, 2, 3, 4, 5, 6 and 7 and appellee's Exhibit A may be considered in their original form and need not be printed.

Dated: November 25, 1955.

Respectfully submitted,

/s/ MARSHALL E. KIDDER,
Attorney for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed November 29, 1955. Paul P. O'Brien, Clerk.

TOPICAL INDEX

| | PAGE |
|--|------|
| Jurisdictional facts | 1 |
| Statute involved | 2 |
| Statement of the case..... | 2 |
| Specifications of error..... | 4 |
| Argument | 5 |
| The evidence establishing relationship of the appellant to his father, Yip Dock, is substantial and credible..... | 5 |
| Burden of proof and scope of review..... | 6 |
| The position of the District Court..... | 7 |
| Summary of the testimony of the three witnesses heard on May 2 and May 3, 1955..... | 10 |
| Testimony of five additional witnesses heard on July 18 and July 26, 1955..... | 13 |
| Basis of the District Court's decision..... | 21 |
| Conclusion | 24 |

TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|--|------|
| Chow Sing v. Brownell, 217 F. 2d 140..... | 6 |
| Fong Wone Ging v. Dulles, 217 F. 2d 138..... | 6 |
| Lee Shew v. Brownell, 219 F. 2d 301..... | 6 |
| Lee Wing Hong v. Dulles, 214 F. 2d 753..... | 6 |
| Lew Wah Fook v. Brownell, 218 F. 2d 924..... | 7 |
| Ly Shew v. Brownell, 219 F. 2d 413..... | 6 |
| Mah Toi v. Brownell, 219 F. 2d 642..... | 6 |
| Mar Gong v. Brownell, 209 F. 2d 448..... | 6 |
| United States v. Oregon Medical Society, 343 U. S. 326, 72 S. Ct. 690, 96 L. Ed. 679..... | 7 |
| United States v. United States Gypsum Company, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746..... | 6 |

REGULATIONS

| | |
|---|---|
| 8 Code of Federal Regulations (1949 Ed.), Sec. 112.2..... | 5 |
|---|---|

STATUTES

| | |
|--|---------|
| Nationality Act of 1940, Sec. 503 (54 Stat. 1171, 1172)..... | 1, 2, 5 |
| United States Code Annotated, Title 8, Sec. 903..... | 1, 5 |
| United States Code Annotated, Title 28, Sec. 1291..... | 1 |
| United States Revised Statutes, Sec. 1993..... | 3 |

No. 14925.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

YIP MIE JORK,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

APPELLANT'S BRIEF.

Jurisdictional Facts.

This case is brought before the Court of Appeals from a judgment of the United States District Court in and for the Southern District of California, Central Division, entered August 11, 1955, dismissing plaintiff's complaint and cause of action for a judgment declaring him to be a national of the United States.

The District Court had jurisdiction of the matter under Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 1172, 8 U. S. C. A. 903), and this Court has jurisdiction to review the final order on appeal under Title 28, U. S. C. A. 1291.

Statute Involved.

Section 503 of the Nationality Act of 1940, in pertinent part, reads as follows:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *”

Statement of the Case.

The appellant, Yip Mie Jork, was born on February 22, 1928 (C. R. 17-2-2) at Kin Mo Village, Chung Shan District, Kwangtung Province, China.

Appellant claims to be the true and lawful blood son of Yip Dock, a native of San Francisco, California, born on March 1, 1885 (K. S. 11-1-15), and a citizen of the United States. The appellee has conceded the citizenship of Yip Dock [Tr. 28]. Yip Dock made trips to China as follows:

Departed: August 8, 1907

Returned: June 20, 1908

Departed: May 11, 1913

Returned: September 28, 1913

Departed: July 10, 1926

Returned: July 5, 1929 [Tr. 28].

The said Yip Dock was married to Wong Shee on May 6, 1913 (C. R. 2-4-1) at Kin Mo Village, Chung Shan District, Kwangtung Province, China, and appellant is the issue of that marriage. Both of appellant's parents are deceased, the father having died at French Rural Camp, San Joaquin, California on December 21, 1929, and the mother in China in C. R. 34 (1945). Appellant claims to be a United States citizen and national under the provisions of Section 1993, Revised Statutes of the United States, which at the time of his birth read as follows:

“Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.”

On or about October, 1950, appellant filed with the American Consul General at Hong Kong, British Crown Colony, an application for issuance of a United States passport or other documentation permitting him to travel to the United States, and such passport or document was denied him on the ground that he is not a national of the United States.

A complaint (entitled a petition) was filed in the United States District Court for the Southern District of California, Southern Division, on December 23, 1952, praying for judgment declaring appellant to be a national of the United States. Trial was had on May 2, 1955 and May 3, 1955, and the court, Honorable Harry C. Westover, found in favor of the appellee on June 2, 1955.

On the petition of appellant, the District Court reopened the case to allow appellant to present additional witnesses to testify in his behalf, and further trial was had on July 18, 1955 and July 26, 1955. The court entered judgment for the appellee on August 11, 1955.

The sole issue involved in this appeal is whether the appellant has sustained the burden of proving that he is the lawful blood son of Yip Dock, and hence is a national of the United States.

Specifications of Error.

1. The District Court erred in finding that the evidence adduced to establish that appellant is the lawful blood son of Yip Dock is scant and that the witnesses had little real knowledge of the claimed relationship and that their testimony was, in many respects, improbable and unworthy of belief.

2. The District Court erred in finding as a fact that appellant failed to present sufficient credible evidence to sustain the burden of proving that he is a lawful blood son of Yip Dock, and in concluding that appellant had failed to sustain the burden of establishing his claim to United States nationality.

ARGUMENT.

The Evidence Establishing Relationship of the Appellant to His Father, Yip Dock, Is Substantial and Credible.

While counsel concedes that the three original witnesses, Yip Share Leung, Yip She Mang and Peter Fong, were able to supply only a portion of the essential family history of the appellant, the five additional witnesses corrected this deficiency except for a "gap" of about four years during the appellant's entire lifetime of 27 years. This "gap" seems to be the complete basis for the decision of the court below.

Counsel would urge that some consideration is due the appellant by both the trial court and the reviewing court because of the appellee's refusal to allow appellant to come to the United States, appear personally before the trial court, and give testimony in his own behalf. While Congress made statutory provisions for those in the position of appellant to journey to the United States and appear at their trial (54 Stat. 1171, 8 U. S. C. A. 903), and the regulations provide certain safeguards in the event the claim of nationality is not established (8 C. F. R. 112.2 (1949 Ed.)), the government, the appellee herein, has consistently denied the claimant a certificate of identity for entry into the United States and appearance at his trial. This practice permits the government to effectively deprive counsel of the services of his principal witness.

Burden of Proof and Scope of Review.

Counsel acknowledges that it is well settled by this Court that the appellant has the burden of establishing the ultimate fact, *i.e.*, that he is the son of Yip Dock, by a preponderance of the evidence. (*Mah Toi v. Brownell*, 219 F. 2d 642; *Ly Shew v. Brownell*, 219 F. 2d 413; *Fong Wone Ging v. Dulles*, 217 F. 2d 138; *Chow Sing v. Brownell*, 217 F. 2d 140.)

The burden of proof is said to be an ordinary one and was emphatically explained by this Court in *Mar Gong v. Brownell*, 209 F. 2d 448. (See also, *Chow Sing v. Brownell*, *supra*, and *Lee Shew v. Brownell*, 219 F. 2d 301.) In the case of *Lee Wing Hong v. Dulles*, 214 F. 2d 753, the Court of Appeals for the Seventh Circuit endorsed the language of this Court in *Mar Gong v. Brownell*, *supra*, that no special quantum of proof should be exacted from any person claiming American citizenship merely because of his racial origin, and stated at page 758:

“We agree with this statement but think it could well be expressed in more emphatic language. We would be much chagrined to think that the adjudication of an asserted right in the courts of this country was dependent in the slightest degree upon the racial origin of the party involved. To think otherwise, is to countenance discrimination in the courts, the one certain place it should be unknown.”

With respect to findings of fact of the trial court, it was said in the case of *United States v. United States Gypsum Company*, 333 U. S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746:

“Since judicial review of findings of trial courts does not have the statutory or constitutional limita-

tions of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' * * * A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

To the same effect, is *United States v. Oregon Medical Society*, 343 U. S. 326, 72 S. Ct. 690, 96 L. Ed. 679.

This Court considered the "clearly erroneous" doctrine in *Lew Wah Fook v. Brownell*, 218 F. 2d 924, 925, and stated that the doctrine does not convert the appellant tribunals into fact finding *de novo* trial courts. It said further:

"The presumption of correctness of the trial court, the view of the witnesses and the live feel of the open forum are all ingredients of the compound which we may adjudge as valid or 'clearly erroneous.' "

Applying this test of the Court to the case at bar, and adhering to the rule of an ordinary burden of proof, *i.e.*, a fair preponderance of all credible evidence, the decision of the District Court should be reversed.

The Position of the District Court.

As the issue here is entirely one of fact, *i.e.*, the blood relationship between Yip Dock and the appellant, Yip Mie Jork, certain views of the court expressed during the course of the trial are pertinent. Counsel wishes to make it clear that he considers the District Court to have been most fair in reopening the trial and hearing testimony of additional witnesses. Three witnesses were presented at the original trial, and, at that time, counsel was not

aware that other persons, principally from the San Francisco area, had knowledge of appellant's pedigree and early history.

At the reopening of the trial, appellant presented five additional witnesses. From the general remarks of the court, it will be seen that the credibility of the witnesses is not seriously challenged, but rather the court is concerned with a so-called "gap" in proving the identity of the appellant continuously from the date of his birth. This "gap" covers only the time from a few weeks after birth until he was approximately four years of age. While the pertinent comment of the court will be discussed more fully hereinafter, it is desired to point out now that the court did state that it *assumes that a marriage occurred between Yip Dock and Wong Shee [Tr. 175], that children were born of this marriage [Tr. 175], and that the court does not doubt that one of the children bore the name of the appellant, Yip Mie Jork [Tr. 100].*

With respect to the original three witnesses, the court stated at page 100 of the transcript: "You know, I am not questioning the credibility of the witnesses, I am not basing this upon the credibility of the witnesses, * * *."

The comment made by the court at the conclusion of the testimony on July 26, 1955, immediately prior to ruling in behalf of appellee, demonstrates again the fairness of the District Court in granting the reopening, but confirms its belief that the evidence was not quite substantial. At pages 202-203 of the transcript, the court said:

"So, I just don't think the court is justified in finding for the plaintiff on this sort of testimony. The Circuit Court has just written an opinion; I didn't bring it in with me, I didn't know I was going

to refer to it, in which the Supreme Court pointed out that these are precious rights, they shouldn't be taken away from the alleged children without substantial proof. On the other hand, these are sacred rights and they shouldn't be given to anyone without some substantial evidence. I don't think the evidence is substantial, that there is enough in this case.

Mr. Kidder, I reopened the case for you because I wanted you to present any evidence you had. The Circuit leans over backward in these cases in favor of the plaintiff. The Circuit may decide there is enough evidence in this case to justify a finding in favor of the plaintiff, but I just don't find it."

and again at pages 203-204:

"Well, I wanted to give you the opportunity to present all the evidence you have. I am very sympathetic with these claims and I want you to present all the evidence you have. Maybe if you will take this to the Circuit, the Circuit will decide there is sufficient evidence in this case to justify the court in determining that the claim of the plaintiff is valid. I am not holding that the claim of the plaintiff is not valid. I am just holding that the plaintiff has not sustained the burden of proof in establishing that in the mind of the court."

Consequently, the question here then is whether the District Court is clearly erroneous in holding that the testimony of the eight witnesses, the contents of the Immigration and Naturalization files relating to the family, and the contents of the file of the Department of State in the name of appellant, are insufficient to sustain the burden of proof.

Summary of the Testimony of the Three Witnesses
Heard on May 2 and May 3, 1955.

YIP SHARE LEUNG.

This witness testified he is the half brother of the appellant and was born at Tao Gong Village, China, 48 years of age, the son of Yip Dock and the latter's first wife, also named Wong Shee [Tr. 30-31]. His mother, Wong Shee, died in C. R. 2 (1913) and his father remarried the same year [Tr. 37]. The witness first came to the United States in 1919 and made the following trips to China:

Departed: C. R. 15 (1926)

Returned: C. R. 20 (1931) [Tr. 39].

Departed: December, 1947

Returned: November, 1949 [Tr. 40].

His first knowledge of the birth of his half brother, Yip Mie Jork, was in the year 1928 when the father wrote to him at his temporary residence in Canton City and informed him of the birth [Tr. 35, 45].

The witness first saw Yip Mie Jork in Macao in the year 1949 [Tr. 35, 51]. At that time, the witness had journeyed to China and surrounding area to paint people and scenery and give an art exhibition in Hong Kong. Shortly before returning to the United States in November, 1949, he wrote to his half brothers, Yip Mie Jork and Yip Share Wong in Kin Mo Village and invited them to visit him. They came to Macao and stayed with him a few days [Tr. 46, 47]. Photographs of all three were taken in 1949 at Macao [Tr. 49] and are in evidence in the present trial. Moreover, in the year 1947, before the witness decided to journey to China,

he gave a letter and \$50.00 to one Peter Fong, a United States resident, for delivery to Yip Mie Jork at Kin Mo Village [Tr. 45-46], and Mr. Fong testified he delivered such articles [Tr. 64].

The court was concerned, of course, about how the witness could recognize the appellant as his half brother when their first meeting did not occur until the year 1949. On this point, the witness testified as follows:

“Q. How did you know this was your brother Yip Mie Jork who came to Macao? A. He came to see me, and then we began to ask, to talk about family affairs and the mothers, the village, and we talk about these affairs, so naturally we know they was my brothers.” [Tr. 47.]

* * * * *

“The Court: How did you recognize them? (Yip Mie Jork and Yip Share Wong)

The Witness: They come over and ask me in the hotel and I come down and meet them and we introduced each other, and we go up to the hotel and we talk over family affairs, and I talk about a minute, and I took in the village and so many years I haven't met them, and I have to talk all the things I know, and they answer me, and I have no doubt in my mind it is my brother, so I put him in—I live on the 4th floor, I remember, and they live in the next room to my room. When you talk to your brother, you ask all the questions, all about the village, all the mother, and all these questions, and they answer, and in that way I have no doubt in my mind they are my brothers.” [Tr. 51-52.]

Certainly it is not unreasonable to believe that two persons, having opportunity to talk of family affairs for

two days, could not become completely satisfied of their common ancestry and blood relationship.

This witness is the closest relative of the appellant residing in the United States.

YIP SHE MANG.

This witness was born on January 7, 1928 at Canton City, China, and is presently a student at the University of California [Tr. 54-55]. He is the son of Yip Share Leung (the first witness) and hence the appellant is his uncle.

The witness first saw the appellant in Kin Mo Village in 1938, for a period of three or four days, when the witness paid a visit to the Yip home with his mother, two brothers and a sister [Tr. 56]. The witness was then about 11 or 12 years of age. He testified further that he remembers the incident of the visit very well because he and his uncles (Yip Mie Jork and Yip Share Wong) were practically the same age, played around the house together [Tr. 58-59], and, in the course of such play, the witness received an injury in the region of his eye and has a permanent scar there [Tr. p. 59].

This witness came to the United States first in 1949 [Tr. 59]. He identified photographs of the appellant and other family members [Tr. 60-61].

PETER FONG.

This witness was born at On Ngai Village, China on August 20, 1920, and is a naturalized citizen of the United States [Tr. 62-63]. He first came to the United States in 1923 [Tr. 62]. His home village is located about one English mile from Kin Mo Village [Tr. 64]. He first

met appellant's half brother, Yip Share Leung, in Los Angeles, California about 1946 and, when the witness was preparing to visit China in September, 1947, the said Yip Share Leung gave him the sum of \$50.00 and a letter to be delivered to Yip Mie Jork in Kin Mo Village [Tr. 64]. The witness delivered the letter and money to Yip Mie Jork in 1947 at the Yip home in Kin Mo Village, and he identified a photograph of Yip Mie Jork [Tr. 66].

**Testimony of Five Additional Witnesses Heard on
July 18 and July 26, 1955.**

LEONG LAN GIN.

This witness, a female, was born on September 11, 1930 in Kin Mo Village [Tr. 104]. She lived in the said village at the home of her parents until she was 18 years of age [Tr. 104] and she locates her home as the last house in the third row counting from the east side of the village [Tr. 105].

This witness is the one who has supplied the most knowledge of appellant's early childhood. The Yip home, where appellant lived was in the same row of houses as that of the witness, and only four houses separated the two domiciles [Tr. 106]. Her testimony concerning her first meeting with Yip Mie Jork and their ages is as follows:

"Q. When did you first meet Yip Mie Jork? A. When we were children at the age of about six years old, we played together in the same street or alley.

The Court: Do you remember when you were six years of age?

The Witness: Well, maybe I don't remember all the other things, activities, but we were playmates from that time on in the same street or alley.

The Court: How old was Yip Mie Jork? Was he your age?

The Witness: A few years older than I.

The Court: How few? Six, seven, eight, one, two?

The Witness: About five years or so.

The Court: Older?

The Witness: Yes.

The Court: When you were six, then he was about 11, is that right?

The Witness: Yes." [Tr. 106.]

Besides playing with Yip Mie Jork in the village streets, the witness testifies to having been in the Yip home on birthdays and other festive occasions, for dinner with her whole family, and stated that Yip Mie Jork often came to her home for dinner and on special occasions [Tr. 107-108]. She began her schooling in Kin Mo Village at ten years of age and appellant attended the same school, although he was in a higher grade. She saw him in school and in the recreation field [Tr. 108].

The witness also testified that a woman named Wong Shee lived in the Yip home with appellant and Yip Share Wong, and that the two boys called the woman "mama" [Tr. 112]. She identified pictures of the said Wong Shee [Tr. 114], as well as of the appellant and Yip Share Wong. The witness also identified a photograph of the person known as Yip Dock (the appellant's father) and asserted that there was a larger picture of this person in the home of the appellant [Tr. 115].

The court remarked [Tr. 199] that it thought this witness was pretty young to remember having met Yip Mie Jork when she was only six years of age. Also, as she

stated the appellant was "5 years or so" older than she, it seemed improbable to the court that an 11-year old boy would play with a 6-year old girl. Actually there is only a difference of two and one-half years in their ages. The error in guessing the age of appellant, especially when the court impelled her to make some conjecture, does not seem to warrant the importance attached to it. A child would not ordinarily know the exact difference of age between herself and a playmate. Counsel would also differ with the court on the capability of remembering incidents occurring at the age of six years, particularly as to neighborhood matters or constant companions. We do not have here the case of children whose families move about either constantly or occasionally; rather, the witness and appellant were neighbors for 18 continuous years, residing only four houses apart. Having played with appellant as a child, attended the same school, exchanged visits in their respective homes, and being well acquainted with his mother and brother, it is not at all unlikely that the witness would have a very good memory of her first meeting with appellant and of the other incidents of their childhood and early youth. If her testimony is believed that she first met Yip Mie Jork when she was six years of age, *i.e.*, about 1936, then her statements serve as proof that appellant, when he was approximately $8\frac{1}{2}$ years of age, was living in the Yip home in Kin Mo Village with Wong Shee (the wife of Yip Dock), whom he called "mama." As this witness has precise knowledge of appellant and his family for at least 12 years, her testimony adds great weight to appellant's cause.

RUSSELL CHAN.

The witness was born in San Diego, California, on May 8, 1924, and is a citizen of the United States [Tr. 124]. He was taken to China in 1927 at the age of three years and lived in New Nam Shan Village until 1938 [Tr. 125]. He also visited in that village from 1947 until 1950 and it is located about 2½ miles from Kin Mo Village [Tr. 125-126].

When the witness was about seven or eight years of age, he met the appellant in the Yip home in Kin Mo Village [Tr. 126]. Thereafter, he saw the appellant three or four times a year until 1938, as his mother and the appellant's mother exchanged visits and were accompanied by their children [Tr. 127-128]. The witness testified as follows:

“The Court: This boy you saw when you were seven or eight years old, you say was Yip Mie Jork. How do you know that?

The Witness: Because I went to his house and his mother told me.

The Court: His mother told you this was Yip Mie Jork?

The Witness: Yes, and then I play with him.

The Court: You played with him?

The Witness: Yes.” [Tr. 129.]

The witness also saw the appellant during his trip to China between 1947 and 1950, approximately three or four times during each of those years [Tr. 134]. He identified a picture of appellant's mother, Wong Shee, the father, Yip Dock, and the other members of the family [Tr. 135-137]. He also asserted that he saw a large picture of Yip Dock on the living room wall of the Yip

home, and that it is the exact photograph, except larger in size, as the one included in Plaintiff's Exhibit 1 [Tr. 136].

FAY JEAN CHEW.

This witness was born in New Nam Shan Village, China, on March 12, 1930, and lived there until she was 18 years of age [Tr. 143-144]. Her village is about one hour's walking distance from Kin Mo Village [Tr. 143]. When asked whether she was related to the appellant, she testified: "My grandma is the younger sister of Mie Jork's mother's father" [Tr. 144]. Although counsel did not—and neither did the court—recognize the relationship from this description (although it was perceived later [Tr. 176]), the appellant and the witness are actually FIRST COUSINS. Her first recollection of appellant is when she was eight or nine years old and he was ten or eleven years of age [Tr. 145]. She names his parents as Yip Dock and Wong Shee [Tr. 145], but was not permitted by the court to give additional testimony on the matter of pedigree on the belief that she was not a member of the family [Tr. 148]. She saw the appellant two or three times a year, stayed overnight in the Yip home in Kin Mo Village, made visits there with her grandmother and sister [Tr. 146] and one time stayed two weeks and another time stayed three weeks in the Yip home. In addition, Yip Mie Jork visited at her home in New Nam Shan Village, once or twice a year, with his mother and brother, Yip Share Wong [Tr. 147]. She states that she discussed family relationship matters with Wong Shee and that the latter was married and the name of her husband was Yip Dock [Tr. 147].

The witness left her home in New Nam Shan Village in 1948 to marry [Tr. 150] and she last saw the appellant in 1949 in her home village when she went back to visit her family and he was visiting there too [Tr. 151]. She identified photographs of the appellant and other members of the family including the mother, Wong Shee, and the father, Yip Dock [Tr. 149-150].

CHIN SHEE.

This witness was born at Old Nam Shan Village on December 26, 1900 and first came to the United States in 1919 [Tr. 153-154]. He first met Yip Dock in 1920 (an error in the transcript records this date as 1900 [Tr. 155]) in Stockton, California, and saw him many times until 1924-1925 at Bock Chai Tong Drug Store in that city, which drug store was operated by a brother of the witness. The said brother was also a friend of Yip Dock, and when the latter died in 1929, the personal effects of Yip Dock, including a wrist watch, fountain pen and clothing, were left in care of the brother [Tr. 156]. These articles were handed to the witness in 1935, when he embarked for a trip to China, for delivery to the wife of Yip Dock who lived in Kin Mo Village adjacent to the home village of the witness [Tr. 157]. The witness testified that he delivered the aforementioned personal effects of Yip Dock to the wife in Kin Mo Village in the year 1935, at which time there were two children in the home named Yip Mie Jork and Yip Share Wong [Tr. 157-158].

This witness also saw appellant on a second trip made to China in the year 1947 [Tr. 158], and a picture depicting this witness with a large group of Chinese (including Yip Mie Jork) taken on a visit to the ancestral

tombs in 1947, is in evidence as Plaintiff's Exhibit 7. The witness last saw Yip Mie Jork in 1949 in Macao with his brothers, Yip Share Wong and Yip Share Leung [Tr. 160].

The witness identified photographs of Yip Dock, Yip Mie Jork, Yip Share Wong and Yip Share Leung [Tr. 161].

CHew JOck.

This witness was born on January 12, 1896 in How Chow Village, Chung Shan District, China, and is a citizen of the United States [Tr. 164-165]. His home village is approximately two hours walk from Kin Mo Village [Tr. 166] and another village where the witness had a later residence, Hin Bin Chin Village, is only about one hour's walk from Kin Mo Village [Tr. 165-166].

This witness first came to the United States in the year 1915 [Tr. 165]. He first met Yip Dock in 1918 in Stockton, California, and saw him many times at Wah Kwen Grocery Store in that city [Tr. 167].

This witness made a trip to China in the year 1926 and remained there until approximately May or June, 1928 [Tr. 165]. He testifies that about November, 1926, he met Yip Dock and the latter's wife, Wong Shee [Tr. 167] and Yip Dock attended the wedding banquet of the witness in How Chow Village [Tr. 168]. The witness attended a birth feast in March or April, 1928 at the home of Yip Dock in Kin Mo Village for a male child named (Yip) Mie Jork [Tr. 169], and characterizes this feast as a "full moon party" for Yip Dock's baby [Tr. 181]. He last saw Yip Dock at a hospital in Stockton, California, about 1929 [Tr. 169].

On a second trip to China made by the witness in 1947, he saw a person named Yip Mie Jork, who came to the home of the witness in Hin Bin Chin Village. He also saw Yip Mie Jork in 1947 when the latter attended an engagement feast given for the son of the witness, and saw Yip Mie Jork again in 1948 at the wedding feast of the son of the witness [Tr. 170-171]. He last saw Yip Mie Jork in 1949 at the home of the witness [Tr. 171].

The witness identified photographs of Yip Dock, Yip Mie Jork, Yip Share Wong and Yip Share Leung [Tr. 171-172].

The government sought to establish a discrepancy in the testimony of this witness by placing in evidence Defendant's Exhibit A, a questionnaire form of the Immigration and Naturalization Service, signed upon the return of the witness to the United States in 1928. This form contains questions written in the English language. The answers are not in the handwriting of the witness and are purportedly recorded by a Chinese interpreter of the Immigration and Naturalization Service just prior to disembarkation at the port of entry. The form is used only in the cases of Chinese persons. The questionnaire signed by the witness contains the following interrogatories:

"Q. Did you visit any resident of this country who happened to be at his home during your recent stay in China, or did you visit the home of such resident? A. No." [Tr. 183.]

"Q. Were you introduced to the son, daughter or wife of any resident of this country? A. Wong Sue Ngit, wife of Jeung Yuk Sung, living in Ling Gung Village." [Tr. 184.]

The witness denied having answered the first question in the negative [Tr. 183], and concerning the second inquiry, stated he could not recall or remember what was asked him at that time [Tr. 184]. It should be noted that in contemplating the questions literally, the person interrogated would have to be positive in answering that he was speaking about a "resident" of this country.

The fact that Yip Dock was in China with his wife and new born child at the time might well negative a belief in the mind of the witness in 1928 that Yip Dock would be classified as a "resident" of the United States. The incident of the questionnaire seems hardly to amount to a major discrepancy destroying the credibility of the witness.

Basis of the District Court's Decision.

As heretofore mentioned, the court's decision seems to be based entirely upon the so-called "gap" in the early history of the appellant. The court said [Tr. 204]:

"* * * there is a gap that I don't think you have been able to cover at all. All you have got is from the date of the birth of the child, and then there is a gap until he is six years of age when he was found in the home of Yip." [Tr. 204.]

On the same page, the court also said:

"Just because there is a child in the home, I don't think that is an indication that the woman in the home is the mother of the child, or the father who goes to the home is the father of the child. In China, the Chinese people have a strong feeling of family responsibility. Of course, there is no evidence here that this alleged mother took a stranger into the family or relative into the family, but, however, it is possible such a thing happened.

“I am not holding that the claim of the plaintiff is not valid. I am just holding that the plaintiff has not sustained the burden of proof in establishing that in the mind of the court.”

The court mentions but one matter which it catalogs as a discrepancy [Tr. 201]. It concerns the female witness Leong Lan Gin, the playmate of appellant in Kin Mo Village. It is suggested by the court that this witness should have been more accurate in estimating the difference between her age and that of the appellant. She testified he was “a few years older,” then upon further inquiry of the court, stated “about five years or so” [Tr. 106]. The court considers this as testimony of a difference of five years in their ages, whereas, an actual difference of only $2\frac{1}{2}$ years existed. The court stated: “You just cannot make a mistake of fifty per cent, a mistake of two and a half years” [Tr. 201].

Counsel urges that it is not at all unlikely that a female witness, guessing at the difference in age of herself and a childhood playmate, especially an older boy, would make an honest error. If this be regarded as a discrepancy, it hardly deserves such weight that it would obliterate the balance of her testimony based on intimate knowledge of the Yip family.

Counsel is dubious that he could secure testimony covering all of the early years of his life, and believes members of this Court might find it equally difficult. The “gap” of which the District Court complains, is infinitesimal considering that apart from a period of approximately four years, the entire life of appellant as the son of Yip Dock and Wong Shee has been covered. One of the witnesses (Chew Jock) attended his birth

feast in March or April of 1928; another witness (Russell Chan) saw the appellant in the Yip home in Kin Mo Village about 1932 or 1933; another witness (Chin Shee) saw him in the Yip home in Kin Mo Village in 1935 another witness (Leong Lan Gin) remembers him first when she was about six years of age (1936), played with him in the streets, went to school with him and visited in his home; other witnesses, including a first cousin, saw him frequently from the late 1930's until at least 1949 and identified his photograph and those of members of the family. Moreover, there is not the slightest indication that the appellant is an adopted child, or that he could be the child of another member of the Yip family being reared in the Yip household in Kin Mo Village.

The quality and quantity of evidence presented in this case would serve easily, in the opinion of counsel, to establish the identity of a Caucasian or non-Caucasian in a civil action to create a record of birth filed in the Superior Court of the State of California. It is unfortunate here, of course, that both parents are deceased, but this factor should not increase the weight of the burden of proof resting upon this Chinese appellant.

A portion of the testimony of most of the witnesses concerns the location of Kin Mo Village and the manner of traveling thereto from Hong Kong or Macao. While at first the court was under the impression that the witnesses were not in agreement as to the location of the village, any doubts seem to have disappeared after counsel for appellant obtained and utilized a Chinese map which delineated in detail the area where the said village is located.

Conclusion.

There is substantial evidence that appellant is the lawful blood son of Yip Dock, and that the District Court is clearly erroneous in finding and concluding that appellant has failed to sustain the burden of proving his relationship to Yip Dock by a preponderance of the evidence.

Wherefore, appellant prays that the judgment of the lower court be reversed and that he be declared to be a national of the United States.

Respectfully submitted,

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No. 14925.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

YIP MIE JORK,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

BRIEF FOR APPELLEE.

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TOPICAL INDEX

| | PAGE |
|--|------|
| Jurisdiction of the court..... | 1 |
| Statement of the case..... | 3 |
| Statutes involved | 4 |
| Argument | 6 |
| I. | |
| Summary | 6 |
| II. | |
| The finding of the District Court that appellant failed to sustain his burden of proving that he is the lawful blood son of Yip Dock is not clearly erroneous..... | 8 |
| A. Burden of proof and scope of review..... | 8 |
| B. Lack of documentary evidence..... | 10 |
| C. Testimony of witnesses presented by appellant at the original trial | 11 |
| D. The position of the District Court..... | 14 |
| E. Testimony of witnesses presented by appellant at reopened hearings | 17 |
| F. Demeanor evidence | 22 |
| G. Bases of the District Court's decision..... | 23 |
| Conclusion | 24 |
| Appendix. Objections to findings of fact.....App. p. | 1 |

TABLE OF AUTHORITIES CITED

CASES

PAGE

| | |
|--|-----------|
| American Ins. Co. v. Scheufler, 129 F. 2d 143, cert. den. 317 U. S. 687..... | 17 |
| Attorney General of the United States v. Ricketts, 165 F. 2d 193 | 9 |
| Broadcast Music Inc. v. Havana Madrid Restaurant Corp., 175 F. 2d 77..... | 22 |
| Chin Chuck Ming v. Dulles, 225 F. 2d 849..... | 2 |
| Chow Sing v. Brownell, 217 F. 2d 140..... | 8 |
| Dulles v. Lee Gnan Lung, 212 F. 2d 73..... | 9 |
| Gamewell Co. v. City of Phoenix, 216 F. 2d 928..... | 22 |
| Howell Chevrolet Co. v. N. L. R. B., 346 U. S. 482..... | 17 |
| Law Don Shew v. Dulles, 217 F. 2d 146..... | 8 |
| Lee Shew v. Brownell, 219 F. 2d 301..... | 8 |
| Lee Wah Fook v. Brownell, 218 F. 2d 924..... | 9 |
| Loeb v. Columbia Township Trustees, 179 U. S. 472..... | 16 |
| Ly Shew v. Dulles, 219 F. 2d 413..... | 8 |
| Mar Gong v. Brownell, 209 F. 2d 448..... | 8, 16, 17 |
| Mar Gong v. McGranery, 109 Fed. Supp. 821..... | 8 |
| National Labor Relations Board v. Howell Chevrolet Co., 204 F. 2d 79..... | 17 |
| Ohlinger v. United States, 219 F. 2d 310..... | 16 |
| Quock Ting v. United States, 140 U. S. 417..... | 17, 22 |
| Quon v. Niagara Fire Ins. Co. of New York, 190 F. 2d 257.... | 24 |
| Ross v. DeWitt, 179 Cal. 272, 176 Pac. 445..... | 17 |
| Stone v. United States, 164 U. S. 380..... | 16 |
| United States v. United States Gypsum Co., 333 U. S. 364.... | 9, 10 |
| Wong Sho Ging v. Brownell, 218 F. 2d 912..... | 17 |

| RULES | PAGE |
|---|------|
| Federal Rules of Civil Procedure, Rule 26..... | 9 |
| Federal Rules of Civil Procedure, Rule 28..... | 9 |
| Federal Rules of Civil Procedure, Rule 30..... | 9 |
| Federal Rules of Civil Procedure, Rule 52(a)..... | 9 |

| STATUTES | |
|---|---------------|
| Immigration and Nationality Act, Sec. 360(a) (66 Stat. 273).... | 2 |
| Immigration and Nationality Act, Sec. 403(a)(42) (66 Stat. 280) | 2 |
| Immigration and Nationality Act, Sec. 407 (66 Stat. 281)..... | 2 |
| Nationality Act of 1940, Sec. 503..... | 1, 2, 4, 8, 9 |
| 54 Statutes at Large, pp. 1171, 1172..... | 1, 4, 9 |
| United States Code Annotated, Title 8, Sec. 903..... | 1, 4, 9 |
| United States Code Annotated, Title 8, Sec. 1503(a)..... | 2 |
| United States Code, Title 28, Sec. 1291..... | 3 |
| United States Revised Statutes, Sec. 1993..... | 3, 5, 10 |

| TEXTBOOKS | |
|--|----|
| 5 Corpus Juris Secundum, Sec. 1480e..... | 17 |
| 3 Wigmore on Evidence (3rd Ed.), Sec. 946..... | 22 |

No. 14925.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

YIP MIE JORK,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction of the Court.

Appellant claimed jurisdiction in the Court below pursuant to Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 1172, 8 U. S. C. A. §903 [R. 3].¹ The District Court concluded that it had jurisdiction [R. 17]. It is the position of appellee that the Court below was without jurisdiction of the subject matter for the reason that appellant was not in fact denied a right or privilege as a national of the United States upon the ground that he was not such a national before his Complaint was filed or

¹"R" refers to the printed Transcript of Record. "Br." refers to Appellant's Brief.

before the repeal of Section 503 of the Nationality Act of 1940.²

The District Court found that the requisite denial had occurred because of appellee's unreasonable delay in passing upon appellant's application for passport [R. 16]. While such delay, if unreasonable, might well effect a denial of a right or privilege of a United States national, it is difficult to perceive how such a denial would be based, in the language of Section 503, "upon the ground that he is not a national of the United States." So long as appellee had not passed upon appellant's application for passport, *no determination of appellant's nationality was made, either adversely or favorably.*

However, since the decision of this Court in *Chin Chuck Ming v. Dulles*, 225 F. 2d 849 (C. A. 9, 1955), where a similar period of delay was involved, is adverse to appellee's position, the jurisdictional issue will not be extensively briefed in this case.³

²Section 503 was repealed by Section 403(a)(42) of the Immigration and Nationality Act, 66 Stat. 280 effective December 24, 1952 (see Section 407 of the Immigration and Nationality Act, 66 Stat. 281). A more restrictive provision is now contained in Section 360(a) of the Immigration and Nationality Act, 66 Stat. 273, 8 U. S. C. A. §1503(a).

³In *Chin Chuck Ming* there was a delay of 15 months and 16 days between the date an affidavit-application was filed and the date the complaint was filed. In the instant case there was a delay of 15 months and 18 days between the date a formal application for passport was filed and the date appellant's complaint was filed. The affidavit of appellant's alleged half-brother contained in Plaintiff's Exhibit 1 is dated August 24, 1950, and if this affidavit is considered, the delay in the present case is considerably increased. In other nationality cases pending before this Court, where the period of delay is shorter, counsel for appellee contemplates a more extensive briefing of the jurisdictional issue. See, for example, *Tam Suey Jin v. Dulles*, No. 14947.

The judgment of the Court below being a final decision, this Court has jurisdiction of the present appeal from that decision under the provisions of 28 United States Code, Section 1291. However, the jurisdiction of this Court ends if it finds that the District Court was without jurisdiction of the subject matter.

Statement of the Case.

Appellant brought action in the Court below seeking a judgment declaring him to be a national of the United States [R. 3-6]. He alleged birth in China on February 22, 1928, and claimed to have derived citizenship and/or nationality through his alleged father, Yip Dock, under the provisions of Section 1993, Revised Statutes of the United States [R. 4, 6].

Trial was held on May 2, 1955 and May 3, 1955, at which appellee conceded the citizenship of appellant's alleged father, Yip Dock [R. 28], and at which three witnesses testified on behalf of appellant [R. 23-101]. After trial, the Court found that appellant had failed to sustain his burden of proving that he is the lawful blood son of Yip Dock [R. 11] and on June 2, 1955 judgment was entered accordingly [R. 12-13].

On July 13, 1955, upon appellant's motion for a new trial, the District Court vacated the judgment entered on June 2, 1955 and ordered the case reopened for the purpose of receiving additional evidence [R. 13-14].

Reopened hearings were held on July 18, 1955 and on July 26, 1955, at which appellant offered the testimony of five additional witnesses. After the conclusion of the reopened hearings, the District Court again found that appellant had failed to sustain his burden of proving

that he is the lawful blood son of Yip Dock, and hence had failed to prove that he was a national or citizen of the United States [R. 17]. On August 11, 1955, judgment was again entered in favor of appellee [R. 18-20]. The present appeal is from the latter judgment [R. 20]. Aside from the jurisdictional issue previously disposed of, the only issue presented by this appeal is as follows:

1. Is the finding of the District Court that appellant failed to sustain his burden of proving that he is the lawful blood son of Yip Dock clearly erroneous?

Statutes Involved.

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 1172, 8 U. S. C. A. §903, provided:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country

in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the appellant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided."

Section 1993 of the Revised Statutes of the United States, on February 22, 1928, the date of appellant's alleged birth, provided:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

ARGUMENT.

I.

Summary.

The burden rested upon appellant to prove his claim to citizenship, that is, to prove that he was the lawful blood son of Yip Dock. This burden of proof was an ordinary one; however, the finding of the Court below that appellant had “failed to present sufficient credible evidence to sustain his burden of proving that he is the lawful blood son of Yip Dock” [R. 17] was not clearly erroneous so as to authorize its being set aside by this Court.

Appellant did not present to the District Court any documentary evidence of sufficient antiquity to attest to the bona fides of his claimed relationship. The documents introduced were of such recent origin that it is not unreasonable to infer that they were obtained for the purpose of establishing appellant’s claim to citizenship.

The testimony of the three witnesses presented by appellant at the original trial not only lacked probative value to establish his claimed relationship, but constituted affirmative evidence negating its existence. None of these witnesses saw Yip Mie Jork during his early childhood; and if the periods of time during which all three witnesses visited with him were combined, the total would amount to no more than 7 days and 15 minutes.⁴ Yip

⁴Yip Share Leung—2 or 3 days [R. 51]; Yip She Mang—3 or 4 days [R. 55-56]; Peter Fong—15 minutes [R. 66].

Share Leung, who claimed to be appellant's half brother, who initiated his claim to citizenship, and who would normally be expected to possess some knowledge of the claim, did not see appellant until the latter was 22 years of age. Yip Share Leung did not communicate with appellant or with his own stepmother between 1931 and 1947, a period of 16 years; nor did he even visit the "home village" during his trip to China from 1947 to 1949.

The findings of the District Court show that it did not believe, in many respects, the testimony of the witnesses presented by appellant at the reopened hearings. The remarks of the Court are not inconsistent with these findings; since at the close of the reopened hearings the Court below made it clear that the credibility of the witnesses was an important factor in its decision. Assuming, however, that the Court's remarks conflict with its findings, the latter should prevail.

There was an adequate basis for the finding of the district court that the testimony of the witnesses was, in many respects "improbable and unworthy of belief": the apparent tendency of the witness Leong Lan Gin to volunteer testimony favorable to appellant; the impeachment of the testimony of witness Chew Jock concerning his purported visit to Yip Dock's home and his introduction to Yip Dock's wife [Deft. Ex. A]; the evasiveness of Chin Shee when confronted with a statement signed by him which would have effectively impeached his testimony [Deft. Ex. B for identification]; together with the demeanor of the witnesses, which is always in evidence.

II.

The Finding of the District Court That Appellant Failed to Sustain His Burden of Proving That He Is the Lawful Blood Son of Yip Dock Is Not Clearly Erroneous.

A. Burden of Proof and Scope of Review.

Appellant properly acknowledges that the burden rested upon him to establish his claim to citizenship, that is, to prove that he is the lawful blood son of Yip Dock (Br. 6; *Ly Shew v. Dulles*, 219 F. 2d 413, 416 (C. A. 9, 1954); *Law Don Shew v. Dulles*, 217 F. 2d 146, 147 (C. A. 9, 1954); *Chow Sing v. Brownell*, 217 F. 2d 140, 142 (C. A. 9, 1954)).

Appellee, in turn, concedes that the burden which rested upon appellant was the burden of proof ordinarily applicable in civil actions (*Ly Shew v. Dulles*, *supra*; *Lee Shew v. Brownell*, 219 F. 2d 301 (C. A. 9, 1955); *Chow Sing v. Brownell*, *supra*). The District Court was fully aware of the proper burden of proof, particularly in view of the reversal by this Court of its decision in *Mar Gong v. McGranery*, 109 Fed. Supp. 821 (S. D. Calif., 1952), reversed in *Mar Gong v. Brownell*, 209 F. 2d 448, 453 (C. A. 9, 1954).

Appellee disagrees, however, with the implication in appellant's brief that he is excused to some unspecified degree from his ordinary burden of proof "because of the appellee's refusal to allow" him to come to the United States (Br. 5). Congress, in authorizing the issuance of certificates of identity to persons instituting actions under Section 503 of the Nationality Act of 1940 in order that they might be admitted to the United States, conditioned such authorization upon "submission of a sworn

application showing that the claim of nationality . . . is made in *good faith* and has a *substantial basis*" (Emphasis added); and the ultimate decision as to whether a certificate of identity should be issued was conferred by Congress upon the Secretary of State (Sec. 503 of the Nationality Act of 1940, 54 Stat. 1171, 1172, 8 U. S. C. A. §903; *Dulles v. Lee Gnan Lung*, 212 F. 2d 73, 75-76 (C. A. 9, 1954)).

In the case at bar, there is no evidence that appellant submitted a sworn application for a certificate of identity. Plaintiff's Exhibit 1, consisting of the passport file relating to appellant, does not contain such an application. If no application was made, clearly appellant would not have been entitled to travel to the United States (see, *Dulles v. Lee Gnan Lung*, *supra*). Even if it be assumed that an application was submitted and denied, it would not, as appellant contends, "effectively deprive counsel of the services of his principal witness" (Br. 5). The testimony of appellant could have been obtained by deposition (Rules 26, 28, and 30, Federal Rules of Civil Procedure).

The scope of review in this Court is governed by Rule 52(a), Federal Rules of Civil Procedure, which provides in pertinent part that "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses" (*United States v. United States Gypsum Co.*, 333 U. S. 364, 395 (1948); *Lee Wah Fook v. Brownell*, 218 F. 2d 924 (C. A. 9, 1955); *Attorney General of the United States v. Ricketts*, 165 F. 2d 193 (C. A. 9, 1947)).

In *Lew Wah Fook v. Brownell*, *supra*, this Court had occasion to place the "clearly erroneous" rule in its proper

perspective. After quoting from *United States v. United States Gypsum Co.*, *supra*, that “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed”, Judge Stephens went on to declare (p. 925):

“* * * This simple statement *does not convert the appellate tribunals into fact finding de novo trial courts. The presumption of correctness of the trial court, the view of the witnesses and the live feel of the open forum* are all ingredients of the compound which we may adjudge as valid or ‘clearly erroneous’. * * *” (Emphasis added.)

B. Lack of Documentary Evidence.

Where one such as appellant claims citizenship under Section 1993 of the Revised Statutes of the United States, he and/or his claimed relatives would normally be expected to have in their possession letters, photographs, or other documents of sufficient age to attest to the genuineness of the claimed relationship. In the case at bar the few documents that were presented to the District Court were of such recent origin that they had little or no probative value.

Plaintiff's Exhibit 5, a group photograph purporting to show appellant, his brother Yip Share Wong, and his half-brother Yip Share Leung, was not taken until September, 1949 [R. 48], just before Yip Share Leung returned to the United States [R. 40]. The photographs contained in Plaintiff's Exhibit 1, excepting one photograph purporting to represent Yip Dock, appellant's alleged father, were taken on the same date as Plaintiff's Exhibit 5 [R. 49-50], or later [see Pltf. Ex. 1]. On August 24, 1950, less than one year after these photo-

graphs were taken, Yip Share Leung executed an affidavit for the purpose of enabling appellant to travel to the United States [see Affidavit of Yip Share Leung contained in Pltf. Ex. 1]. Since the first step to bring appellant to the United States was initiated within a short time after the photographs were taken, it is not unreasonable to infer that they were taken for the purpose of being used as evidence in support of appellant's claim to citizenship. Plaintiff's Exhibit 7 falls in the same general category, although purportedly taken in 1947 [R. 159].

No letters at all were introduced which antedated the Affidavit of Yip Share Leung. Plaintiff's Exhibit 1 contains one empty envelop from a Yip Share Leung to a Yip Mai Jork, postmarked October, 1950 and one letter dated August 30, 1952. No other letters of any nature were presented to the court.

C. Testimony of Witnesses Presented by Appellant at the Original Trial.

YIP SHARE LEUNG

The testimony of Yip Share Leung not only lacks probative value, but constitutes affirmative evidence that appellant's claimed relationship does not in fact exist. This witness was allegedly appellant's half-brother [R. 38], and it was he who executed an affidavit for the purpose of enabling appellant to travel to the United States as a citizen [see, Pltf. Ex. 1 which contains this affidavit]. Normally, Yip Share Leung would have been expected to possess considerable knowledge of appellant, obtained either through personal acquaintance or through correspondence. Yet, the only occasion upon which Yip Share Leung saw appellant was in September, 1949, when the latter was 22 years of age [R. 35-36, 48,

50-51]. This meeting lasted for two or three days only [R. 47, 51].

Between 1931 and 1947, Yip Share Leung, who was then residing in the United States, did not receive a single letter either from Yip Mie Jork or from his own step-mother [R. 76, 78]; nor did the witness write any letters to Yip Mie Jork or to the village during this period [R. 45, 77]. The first letter that Yip Share Leung received from Yip Mie Jork was in 1952 [R. 76], and the first letter that the witness wrote to Yip Mie Jork, which letter he purportedly gave to one Peter Fong, was in 1947 [R. 45-46].

Yip Share Leung went to China in 1947, but it was September, 1949 before he saw appellant [R. 41, 48]. Even this meeting did not take place in the "home village", but in Macao [R. 41]. During his trip to China from 1947 to 1949 Yip Share Leung did not even visit the "home village" [R. 44]; although both his former wife and mother were buried there [R. 82], and he could have made the trip in about a day [R. 41, 82].

Yip Share Leung purportedly sent a letter and \$50.00 to appellant in 1947 through one Peter Fong [R. 45-46]; however, since the witness had never sent any money to appellant before that time [R. 80], and had not even communicated with the "home village" for sixteen years, it is difficult to imagine what prompted this sudden generosity.

Moreover, a statement given by Yip Share Leung to the Immigration and Naturalization Service upon his return to the United States in 1949 further indicates that the persons whom he saw in Macao in 1949, and with whom he had photographs made, were not in fact

his half-brothers [R. 82-83]. This statement, dated December 8, 1949 is contained in Plaintiff's Exhibit 4; however, the impeaching portions thereof were read into the record [R. 83], and are quoted below:

“Q. Where is your oldest half-brother, Yip Jeang Shing at the present time? A. I don't know. I didn't see him in China on this trip.

Q. Where is your half-brother Yip Mie Jork? A. He is in Kin Mo Village, but I didn't see him on this trip either.

Q. Where is your half-brother Yip Share Wong at the present time? A. He is also in the village. However I didn't see him.”

If the above-quoted answers be true, then Yip Share Leung's testimony that he saw his half-brothers in Macao in 1949 and had photographs made with them was completely refuted.

YIP SHE MANG

Yip She Mang, appellant's alleged nephew, testified that he visited the home of Yip Mie Jork in Kin Mo Village for a period of three or four days during 1938 [R. 55-56]. The witness stated that he was then about 11 or 12 years of age [R. 56], and that Yip Mie Jork was about one year younger [R. 58]. At trial, which took place seventeen years after Yip She Mang's visit to Kin Mo Village, the witness purported to identify photographs of appellant [R. 60-61]. These photographs were taken in 1949 [R. 49-50], approximately eleven years after the witness' visit. It is highly improbable that this purported identification was based upon the witness' independent recollection of the features of Yip Mie Jork from his brief visit to Kin Mo Village in 1938. It is more probable

that such identification was based, either consciously or unconsciously, upon discussion of the photographs after Yip Share Leung, the father of Yip She Mang, brought them back from Macao in 1949 [R. 90-91].

PETER FONG

Peter Fong testified that he visited the home of Yip Mie Jork in Kin Mo Village during 1947 [R. 64], delivering a letter and \$50.00 given to him by Yip Share Leung [R. 64-65]. Although Peter Fong saw Yip Mie Jork only upon this one occasion, and his visit lasted *only about fifteen minutes* [R. 66], he purported to identify a photograph of appellant as the person with whom he visited [R. 66]. That the witness' identification was based upon such a brief visit to Kin Mo Village approximately eight years before trial is extremely unlikely.

D. The Position of the District Court.

Appellee disagrees with the statement in Appellant's Brief that "the credibility of the witnesses was not seriously challenged" by the District Court (Br. 8), since the findings of that Court show the contrary. Finding of Fact No. VI reads in part as follows [R. 16-17]:

"VI.

"The evidence adduced by the plaintiff to establish that he is the lawful blood son of Yip Dock was so scant; the witnesses who testified on behalf of the plaintiff had so little real knowledge of the claimed relationship; and the testimony of the witnesses who appeared on behalf of the plaintiff was, in many respects, *so improbable and unworthy of belief*;
* * * (Emphasis added.)

And Finding of Fact VII provides [R. 17]:

“VII.

“The plaintiff has failed to present sufficient *credible* evidence to sustain his burden of proving that he is the lawful blood son of Yip Dock.” (Emphasis added.)

Thus, it may be seen that the Court below did challenge the credibility of appellant’s witnesses, to such a degree that mention thereof was made in its findings. The remarks of the Court are not inconsistent with these findings. It is true that at the conclusion of the original trial, the Court indicated that it was not questioning the credibility of the three witnesses who had up to that time testified [R. 100]. However, at the end of the reopened hearings, just before ruling for a second time in favor of appellee, the District Court made it clear that the credibility of the witnesses was an important factor in its decision. At that time the Court declared [R. 200-201]:

“* * * *One of the main things in these cases is the credibility of the various witnesses.*

“The only thing the Government has to do in these cases is to try to break down the credibility of the witnesses, to see whether or not the witness is telling the truth. When we try to determine whether or not all the pieces will fall in together and will add up to the total sum or bring the conclusion we want, we have to rely upon the testimony of witnesses.

“*What we are trying to do is to determine whether or not the witnesses are telling the truth, and if they are, whether or not the stories will jibe.*” (Emphasis added.)

It was not necessary for the District Court to brand appellant's witnesses as perjurers in order to discredit their testimony. In *Stone v. United States*, 164 U. S. 380 (1896), the Court of Claims in its opinion had stated: "The Court has no reason in this particular case, other than the lapse of time and the inaction of the claimant, to discredit the witnesses or suspect the claim." The Supreme Court in commenting upon this statement said (p. 382):

"* * * It is true the court does not find that the witnesses have sworn falsely, *but that is not essential even when that is its belief. To say that the testimony is not satisfactory is more polite and less offensive, and at the same time equally sufficient.*
* * *" (Emphasis added.)

Even if it be assumed that the remarks of the Court below were in conflict with its findings, the latter should prevail. While an oral or written opinion may be resorted to for certain purposes (*Loeb v. Columbia Township Trustees*, 179 U. S. 472 (1900); *Mar Gong v. Brownell*, 209 F. 2d 448, 450 (C. A. 9, 1954)), it may not be used to control, refute, or modify the findings of fact upon which the judgment is based.⁵ (*Stone v. United States, supra*; *Ohlinger v. United States*, 219 F. 2d 310, 311 (C. A. 9, 1955); *American Ins. Co. v. Scheufler*, 129

⁵In the District Court appellant objected to Finding of Fact No. VI and sought to have substituted a finding which supports the position which he now takes in his brief. The fact that the District Court overruled these objections adds emphasis to the rule that this finding should prevail over any inconsistent oral remarks. Appellant's objections to the findings were not made a part of the record, since appellee did not anticipate the position now assumed by appellant. However, these objections are being printed in the Appendix to this brief.

F. 2d 143, 146 (C. C. A. 8, 1942); cert. den. 317 U. S. 687; *Ross v. DeWitt*, 179 Cal. 272, 176 Pac. 445 (1918); 5 C. J. S. Appeal and Error, §1480e.)

E. Testimony of Witnesses Presented by Appellant at Reopened Hearings.

The findings of the District Court clearly show that it did not believe, in many respects, the testimony of the witnesses presented by appellant at the reopened hearings [R. 17];⁶ and it was not required to do so, even though such testimony may have been unimpeached or not directly contradicted (*Quock Ting v. United States*, 140 U. S. 417, 420 (1891); *Wong Sho Ging v. Brownell*, 218 F. 2d 912 (C. A. 9, 1955); *Mar Gong v. Brownell*, 209 F. 2d 448, 449 (C. C. A. 9, 1954); *N. L. R. B. v. Howell Chevrolet Co.*, 204 F. 2d 79 (C. A. 9, 1953), affirmed in *Howell Chevrolet Co. v. N. L. R. B.*, 346 U. S. 482). The testimony of three of these witnesses, Leong Lan Gin, Chew Jock, and Chin Shee, deserve special comment.

LEONG LAN GIN

The District Court specifically expressed dissatisfaction with the testimony of Leong Lan Gin [R. 111, 199, 201]. The latter witness, upon whom appellant places great reliance (Br. 13-15), testified that she lived in the same village with appellant until she was 18 years of age [R. 104], went to school with him [R. 105, 108], visited his home [R. 107], and played with him [R. 108-109]. While the remarks of the District Court were confined to a few discrepancies and improbabilities in the testimony of Leong Lan Gin, it does not follow that these were the

⁶This proposition is emphasized by the fact that the original findings made no reference to credibility [R. 11].

only factors which gave rise to its dissatisfaction. The Court below undoubtedly noted the tendency of Leong Lan Gin to volunteer testimony favorable to appellant even though such testimony was not responsive to the questions propounded. Illustrative of this tendency are the following quotations [R. 112-113]:

“Q. By Mr. Kidder: Did you have any conversation with Wong She regarding the family history of the Yip family? A. I never ask very many questions, but all I know the two boys call this Wong She mama.

Mr. Davis: I object to that as being unresponsive to the question asked. I wonder if we might ask the witness, through the interpreter, to try to contain her answers to the questions.

The Court: If you have a motion to strike, it is denied. It is up to the court to evaluate the testimony of this witness.

Q. By Mr. Kidder: Were you ever present when there was any discussion concerning the family history of Yip Mie Jork? A. In the village a young lady doesn't go into the family affairs of another family, but in the midst of my visiting with these people, I only feel that these two boys were the sons of this lady, Mrs. Wong, but usually our conversations dwelt on school accomplishments, you know, about school, what do we do in school, and so on and so forth.

The Court: May I ask the witness a question? Do you know the difference between a full brother and a half brother?

The Witness: As far as I know, they both call this woman mama.

The Court: Do you know what a half brother is?
The Witness: I don't notice it.

The Court: You don't know what a half brother means? [106]

The Witness: I understand what you mean, but I don't feel they are half brothers."

Moreover, considering the long acquaintance and friendship which the witness claimed for appellant [R. 105-115, 197], it is difficult to imagine why she should have been reluctant to testify at the original trial [R. 197-198].

CHew JOck

The testimony of Chew Jock was sufficiently impeached to justify the District Court in regarding it as a recent fabrication. At trial Chew Jock testified, among other things, that he made a trip to China in 1926 and remained there until approximately may or June, 1928 [R. 165]; that during this trip he was introduced to the wife of Yip Dock, appellant's alleged father [R. 179]; and that during March or April, 1938 he attended a dinner or baby banquet being held at Yip Dock's home for Yip Mie Jork [R. 168-169]. Chew Jock testified that during this trip the only person that he visited in China was Yip Dock [R. 181-182]; and that he was not introduced to any other person in China except to the wife of Yip Dock [R. 182].

Contrast this testimony with Defendant's Exhibit A, consisting of a statement bearing Chew Jock's signature [R. 182] dated June 13, 1928, and given by the witness to the United States Immigration Service upon his return to the United States. This statement reads in pertinent part:

"Did you visit any resident of this country who happened to be at his home during your recent

stay in China, or did you visit the home of such resident? No.

“Were you introduced to the son, daughter, or wife of any resident of this country? WONG SOO NGIT wife of JEUNG YUT SUNG, living in Ling Gong Vill, S. N. D.”

Thus, in his statement of June 13, 1928, Chew Jock did not mention his claimed visit to Yip Dock's home, nor did he mention his introduction to the wife of Yip Dock. Instead, he refers to his introduction to one Wong Soo Ngit, wife of Jeung Yut Sung. This contradiction becomes even more significant when it is realized that during trial Chew Jock stated that the only person that he visited in China during his trip from 1926 to 1928 was Yip Dock [R. 181-182], and that he was not introduced to any person other than to the wife of Yip Dock [R. 182].

The statement obtained from Chew Jock by the United States Immigration Service was designed to prevent him from thereafter fabricating testimony in support of claims of citizenship. This purpose is revealed by the following additional remarks on Defendant's Exhibit A:

“(NOTE) Witness should be advised that his statements in reply to these questions will be used should he testify at any future time as to the relationship claimed to exist between an applicant for admission and a Chinese resident of the United States. Indicate compliance with above instructions by notation ‘Witness so advised.’ ADVISED.”

Appellant suggests that Chew Jock did not know that Yip Dock was a “resident” of the United States (Br. 21). The witness' own testimony indicates otherwise. Chew

Jock testified that he first met Yip Dock in Stockton, California in 1918 [R. 166] and that he saw him many times in Wah Kwen Grocery Store in that city [R. 166-167].

CHIN SHEE

Upon direct examination Chin Shee testified that he went to China in 1935 and returned to the United States in 1936 [R. 154]; that on this trip he took with him certain articles which had belonged to Yip Dock, appellant's alleged father [R. 156]; and that he delivered these articles to the wife of Yip Dock in Kin Mo Village [R. 157]. While in the village, he testified that he was introduced to the children of Yip Dock, including the appellant, Yip Mie Jork [R. 157-158].

However, when Chin Shee returned to the United States in 1936, he signed a written statement to the effect that he did not take anything to anyone in China on the trip [Deft. Ex. B for identification]. While this statement was not received in evidence [R. 193], the feeble efforts of the witness to explain its contradictory contents during cross-examination afforded an adequate basis for the District Court to disregard his entire testimony [R. 190-191]:

"Q. I am going to read to you from Defendant's Exhibit [199] B for identification and ask whether that question was asked you or whether this was the answer you gave on about December 18, 1936? 'Q. Did you take any money, letters, or anything else from the United States to anyone in China on this trip, and if so, to whom? A. No.' A. The package I brought was not a gift brought back for anybody. It was something that was inherited, left from the deceased to be conveyed back to the family. It was not a gift.

Q. Was that question asked you and was that the answer you gave? A. When they asked me the question, everybody was in a rush getting ready to get ashore at that time when the questions were asked.

Q. Was that question asked you and was that the answer you gave? A. I don't remember.

Q. You stated that the material that you carried back was an inheritance so you didn't consider that a gift? A. I classified that that way."

It will be observed that the witness first sought to justify his prior contradictory statement on the theory that the articles which he took back to China in 1935 were an inheritance rather than a gift. Next, he attempted to explain the inconsistency by stating that "when they asked me the question, everybody was in a rush getting ready to get ashore." Then, he claimed not to remember the question and answer at all [R. 191]!

F. Demeanor Evidence.

With respect to all of the witnesses who testified before the District Court, their demeanor was in evidence and was undoubtedly considered by the court (*Quock Ting v. United States*, 140 U. S. 417, 421 (1891); *Gamewell Co. v. City of Phoenix*, 216 F. 2d 928, 931 (C. A. 9, 1954); *Broadcast Music Inc. v. Havana Madrid Restaurant Corp.*, 175 F. 2d 77, 80 (C. A. 2, 1949); Wigmore on Evidence, Vol. III, Third Ed., §946).

The rule was vividly expressed in *Broadcast Music, Inc.*, *supra*, where the Court declared (p. 80):

"* * * the demeanor of an orally-testifying witness is 'always assumed to be in evidence.' It is 'wordless language' The liar's story may seem uncontradicted to one who merely reads it, yet it may

*be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned. For such a court, it has been said, even if it were called a 'rehearing court,' is not a 'reseeing court.' * * ** (Emphasis added.)

G. Bases of the District Court's Decision.

The decision of the District Court was not, as appellant contends, "based entirely upon the so-called 'gap' in the early history of appellant" (Br. 21). While this "gap" may have been a factor in the decision of the Court below, it was not the only factor. This is indicated by the action of the Court in overruling Appellant's Objections to Findings of Fact (see, Appendix). Here again, the findings of the District Court afford a more reliable guide. Findings of Fact Numbers VI and VII indicate that the decision of the Court below was based upon the following three grounds [R. 16-17]:

1. Appellant's evidence was scant.
2. Appellant's witnesses possessed little real knowledge of his claimed relationship.
3. Appellant's witnesses lacked credibility.

The foregoing bases fully support the decision of the District Court and are themselves supported by the record. The fact that appellant called a total of eight witnesses in the Court below, in itself, means nothing. It is not the number of witnesses presented, but the quality of their testimony, that determines the course of judicial decision.

As this Court, in *Quon v. Niagara Fire Ins. Co. of New York*, 190 F. 2d 257 (C. A. 9, 1951), had occasion to remark (p. 259):

“* * * it is not true that the trier of the fact is bound to find in accordance with the statement of one witness *or any number of witnesses which do not satisfy his mind*. This is a stock instruction to juries. The burden of proof was on appellant. If the testimony produced lacked credibility, it was not proof even if uncontradicted. *The problem of proof cannot be resolved scientifically by quantitative analysis, as some have suggested. The Trial Judge was the arbiter.* * * *” (Emphasis added.)

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the finding of the Court below that appellant failed to sustain his burden of proving that he is the lawful blood son of Yip Dock is not clearly erroneous, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
*Assistant U. S. Attorney,
Chief of Civil Division,*

JAMES R. DOOLEY,
*Assistant U. S. Attorney,
Attorneys for Appellee.*

APPENDIX.

[Title of District Court and Cause]

OBJECTIONS TO FINDINGS OF FACT.

Plaintiff objects to Finding of Fact VI contained in the document entitled "Findings of Fact and Conclusions of Law", prepared by defendant, and suggests to the Court that the following be substituted therefor:

VI.

The evidence adduced by the plaintiff to establish that he is the lawful blood son of Yip Dock was not sufficient to satisfy this Court of the claimed relationship; that the testimony of the witnesses, while not improbable or unworthy of belief, failed to produce evidence concerning the said relationship from the time of plaintiff's birth on CR 17-2-2 (February 22, 1928) until approximately September, 1936, the date when the witness Leong Lon Gin testified she first has a recollection of plaintiff; that because of this failure to produce evidence covering the aforesaid gap or chronological interruption in the family history, the plaintiff has not satisfied or convinced this Court that the person who purports to be Yip Mie Jork, and who executed an application for passport at the American Consulate General, Hong Kong, B. C. C. on September 5, 1951, is the lawful blood son of Yip Dock, or satisfied or convinced this Court that the person who purports to be Yip Mie Jork is in truth and in fact Yip Mie Jork.

DATED: August 9, 1955.

Respectfully submitted,
/s/ MARSHALL E. KIDDER
Marshall E. Kidder

Attorney for Plaintiff.

[Endorsed]: Filed August 9, 1955.

No. 14925

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

YIP MIE JORK,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

APPELLANT'S REPLY BRIEF.

FILE

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MAY - 4 1956

PAUL P. O'BRIEN, CL

TOPICAL INDEX

PAGE

| | |
|--|-----------|
| Appellee's denial of request of appellant to enter the United States and testify at the trial..... | 1 |
| The credibility of the witnesses..... | 3 |
| Reasons for the lower court judgment..... | 4 |
| Appendix: | |
| Letter from Office of American Consulate General, Hong Kong, April 22, 1954..... | App. p. 1 |

TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|--|------|
| Chin Chuck Ming v. Dulles, 225 F. 2d 849..... | 6 |
| Fukumoto v. Dulles, 216 F. 2d 353..... | 5 |
| Schneiderman v. United States, 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796..... | 5 |
| See Yee Ming v. Dulles, 136 Fed. Supp. 199..... | 3, 6 |
| Wong Sho Ging v. Brownell, 218 F. 2d 910..... | 4 |

No. 14925

IN THE

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YIP MIE JORK,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

APPELLANT'S REPLY BRIEF.

Appellee's Denial of Request of Appellant to Enter the United States and Testify at the Trial.

In his Opening Brief, appellant complained that he was precluded by action of the appellee from coming to the United States, under law and regulations provided for such purpose, so that he might testify in his own behalf at the trial of the action. Appellee answers (Appellee's Br. pp. 8-9) that there is no evidence that appellant submitted a sworn application for a Certificate of Identity which would permit him to be granted a travel document.

Appellee has not searched his file adequately for, had he done so he would have ascertained that appellant *did submit* an application for Certificate of Identity to the

American Consul General at Hong Kong, B. C. C. on or about May 14, 1953, and the said Consul refused to act upon such Certificate because of specific instructions received from the Department of State in this case. The letter from the office of the American Consulate General, Hong Kong, B. C. C., dated April 23, 1954, advising appellant's counsel of a refusal to act upon the application for Certificate of Identity, is quoted in full in the Appendix to this Brief.

Appellee suggests further that the testimony of the appellant could have been obtained by deposition. Since appellee himself places such great emphasis upon the trial court's observation of the demeanor of the witnesses (Appellee's Br. pp. 23-24), the suggestion exudes impotency. Counsel's recollection is that the State Department file, in evidence, pertaining to the application for United States passport, contains statements and testimony of appellant under oath concerning his pedigree and history. Hence, a deposition would add little to the facts already offered and would give no opportunity for the trial court to observe the appellant, judge his credibility in the live feel of the open forum, and test his knowledge of the family history and related matters.

That appellee is able to, on the one hand, effectively and completely estop the appellant from appearing before the trial court as a witness in his own behalf on the priceless issue of his right to be recognized as a United States citizen, and, on the other hand, blandly urge that appellant has not sustained the burden of proof, creates a

situation that counsel has found it extremely difficult to reconcile with a sense of fairness and justice.

In the case of *See Yee Ming v. Dulles*, 136 Fed. Supp. 199 (U. S. D. C., W. D., Pa.), where counsel for the plaintiff was seeking a Certificate of Identity in behalf of his citizen claimant, the court said at page 200:

“In the event of failure to secure the presence of petitioner, the trial plans would require an attempt to establish petitioner’s contention by indirect or substantial evidence.

“The additional expense and effort, as well as a possible unsatisfactory record, if the latter method of trial is adopted, indicate why counsel is willing to have actual disposition of the case delayed until he has exhausted every possibility of having petitioner present in court.”

The Credibility of the Witnesses.

The alleged discrepancies in the testimony of the witnesses, Chew Jock and Chin Shee, mentioned in Appellee’s Brief at pages 19 to 22, all stem from the Immigration Service form which is prepared by a Chinese interpreter immediately prior to disembarkation of Chinese passengers from vessels arriving in the United States. It is a form utilized only in the cases of persons of the Chinese race independent of nationality. These Chinese, in the moments immediately prior to docking of the arriving vessel, are supposed to detail unfailingly, among many other things, all introductions to families of United States residents and visits to the homes of United States residents, occurring during the period of their stay in China. The

absences, in most instances, extend over a period of at least one year. It would require the most alert memory to furnish the details required by the form and, for that reason, it falls far short of completeness or unerring accuracy.

With respect to the testimony of the important witness, Leong Lan Gin, who was appellant's playmate in Kin Mo Village, the court seems to have challenged her testimony only because it thought it strange that an "eleven-year-old boy will play with a six-year-old girl." [Tr. 201.] However, when we reflect upon the actual birth dates of the two children (February 22, 1928 and September 11, 1930), it will be noticed that there is *only 2½ years difference in age*, although the witness, Leong Lan Gin, guessed that there was a difference of "about five years or so." [Tr. 106.] Counsel is prompted to say that at least a range of 2½ years in the ages of childhood playmates, irrespective of sex, is quite usual and common and evaporates the ground for suspicion here.

Appellee has made no comment upon the testimony of Fay Jean Chew, first cousin of the appellant, whose testimony is unimpeached.

Reasons for the Lower Court Judgment.

Although appellee argues that the findings of the court below are unassailable, the reasons for the findings and judgment can be considered on review. This Court has done so heretofore. See *Wong Sho Ging v. Brownell*, 218 F. 2d 910, decided January 21, 1955, which case also involved a suit for declaratory judgment of citizenship.

Although the trial court made a statement concerning the credibility of witnesses in general in this type of proceeding [Tr. 200-201], the reason for the judgment is contained in the oral remarks preceding the decision. The crux of the reasoning is located in the following statement of the court [Tr. 200]:

“I was hoping that we could have a witness who could testify as to the birth of the boy and also testify that he had seen the boy grow up in the home, and so on. But we have witnesses who can only testify partially.”

The trial court in the case at bar seems concerned only with the fact that the proof did not cover every period of appellant's life and specifically in the days of the cradle. At most, the “gap” is but a mere four years. Most of us could not satisfy the burden which was suggested by the lower court in these words [Tr. 204]:

“Just because there is a child in the home, I don't think that is an indication that the woman in the home is the mother of the child, or the father who goes to the home is the father of the child. In China, the Chinese people have a strong feeling of family responsibility. Of course, there is no evidence here that this alleged mother took a stranger into the family or relative into the family, but, however, it is possible such a thing happened.”

The facts and the law should be construed as far as is reasonably possible in favor of a citizen. (*Schneiderman v. United States*, 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796; *Fukumoto v. Dulles* (9 Cir.), 216 F. 2d 353.)

The words of this Court in *Chin Chuck Ming v. Dulles*, 225 F. 2d 849, decided September 6, 1955, furnish a judicious guide by which the proof offered in appellant's case should be measured. It was said in that case at pages 852 and 853:

“We are not dealing here with one seeking to become a citizen but with the right to establish a claimed existing United States citizenship. Such citizenship is described by the Supreme Court as regarded by many as the highest hope of civilized man. In *Schneiderman v. United States*, 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796, it states: ‘For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized man.’ ”

See also:

See Yee Ming v. Dulles, supra.

Respectfully submitted,

MARSHALL E. KIDDER,

Attorney for Appellant.

APPENDIX.

THE FOREIGN SERVICE OF THE UNITED STATES OF AMERICA

American Consulate General,
Hong Kong, April 22, 1954.

Marshall E. Kidder, Esquire,
408 South Spring Street,
Los Angeles 13, California.

Sir:

Reference is made to your letter of April 7, 1954 inquiring as to the status of the citizenship case of Yip Mie Jork. As the subject was informed by the Consulate General's letter of September 11, 1953 the Department of State disapproved his passport application on August 27, 1953 on the ground that his claimed identity had not been established.

Administrative action was completed in this case and the disapproval of the passport application took place, as will be seen, approximately eight months after the Nationality Act of 1940 had been repealed by Section 403(a) of the Immigration and Nationality Act which took effect on December 24, 1952. Since it appears, therefore, that Section 503 of the Nationality Act of 1940 (8 USC 903) does not apply in this case, the Consulate General, on the instructions of the Department of State, is taking no further action on the application for a Certificate of Identity which the subject executed on May 14, 1953.

Please be assured that if further instructions are received from the Department of State concerning this case, the Consulate General will take any action required without delay.

Very truly yours,

For the Consul General:

/s/ S. M. Backe

/t/ S. M. Backe

American Consul.

